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Modern American Law

A Systematic and Comprehensive Commentary on the Fundamental Principles of American Law

PREPARED BY

JUDGES, MEMBERS OF THE BAR, TEACHERS IN LAW SCHOOLS, AND WRITERS ON LEGAL SUBJECTS

UNDER THE EDITORIAL SUPERVISION OF

EUGENE ALLEN GILMORE, A.B., LL.B.
LATE DEAN, UNIVERSITY OF IOWA LAW SCHOOL

ASSISTED BY

WILLIAM CHARLES WERMUTH, M.S., LL.B.
FORMER LAW LECTURER, NORTHWESTERN UNIVERSITY

BLACKSTONE SCHOOL OF LAW
CHICAGO

Modern American Law

PUBLIC SERVICE COMPANIES COMMON CARRIERS

BY

BRUCE WYMAN, A.M., LL.B.,
FORMER PROFESSOR OF LAW, HARVARD LAW SCHOOL

PUBLIC OFFICERS AND ELECTIONS

BY

EDWIN MAXEY, D.C.L., LL.D.,
PROFESSOR OF PUBLIC LAW AND DIPLOMACY, UNIVERSITY OF NEBRASKA

MUNICIPAL CORPORATIONS

BY

HENRY H. INGERSOLL, A.M., LL.D.,
LATE DEAN OF THE COLLEGE OF LAW, UNIVERSITY OF TENNESSEE

VOLUME 7

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CHICAGO

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PREFACE.

Very early in the history of the law, business came to be divided into public and private. To put the matter more precisely, callings or occupations were either public or private. The origin of the law of public callings and the duties and liabilities of those engaged in them are clearly set forth here in the text treatise on Public Service Companies and Common Carriers. The treatise also explains the advisability of regulation and control of such companies and the principles on which such control is exercised.

The next article—Public Officers and Elections—should be one of special interest to every one under a government like that of the United States, where so many officers are elected and where so many of the people participate in the elections. At least once a year every qualified citizen is called upon to participate in the election of a public officer. This right was not established easily in the first place and in the second place it has been a long and difficult struggle to maintain, the matter even being a phase of recent world conflicts. The free election is an important ally of democratic government, acting as the substitute for force in the settlement of civil disagreements, and consequently this matter of what

constitutes a valid election, the rights of voters, and the rights and duties of public officers should be of vital concern to every voter.

The last treatise in this volume—Municipal Corporations—should also be of interest to many citizens, as a very large part of our population lives in cities, towns, and villages. The government organization under which they live and by which they work out their common interests and problems is known as a municipal corporation. The power of such a corporation does not necessarily increase with its size and many a city has found itself helpless to achieve some purpose for which it felt itself destined. As Justice Cardozo wrote: "Chalcedon was called the city of the blind because its founders rejected the nobler site of Byzantium lying at their feet . . . The need for vision of the future in the goverance of cities has not lessened with the years."

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PART I

PUBLIC SERVICE COMPANIES COMMON CARRIERS

BY

BRUCE WYMAN, A.M., LL.B.*

ESTABLISHMENT OF PUBLIC DUTY

CHAPTER I.

PUBLIC EMPLOYMENT.

1. Public employment distinguished from private business.—From the beginnings of our law to the present time the distinction between public employments and private business has been considered fundamental. All businesses both public and private are subject to that general police power of the state whereby in any civilized society the effort is made to promote the general welfare by positive law. But any comparison of the large amount of systematic coercion which it is considered proper

* Former Professor of Law, Harvard Law School. Author: "The Principles of Administrative Law"; "Control of the Market"; "Public Service Corporations." Co-author: Beale and Wyman's "Railroad Rate Regulation." Editor: Cases on Public Service Companies; Cases on Restraint of Trade. Contributor to legal journals. Consulting counsel for various railroads and public utilities.

for the state to impose upon public services with the small extent of the regulating power over private businesses is in itself significant enough. Those in a public calling have always been under the extraordinary duty to serve all comers whether it was agreeable or not, while those in a private business may always refuse to serve if they choose. In public business one must serve all who apply without making unreasonable conditions, provide adequate facilities to meet indicated demands, exact only reasonable charges for services rendered, and between customers similarly circumstanced make no discriminations. In private business, on the other hand, one may turn away whomsoever he chooses, manufacture such quantities as he pleases, demand any price which he can get, and give any rebates which are advantageous.

2. **History of the public employments.**—In the middle ages, as we view conditions through our earliest law reports, this distinction between public callings and private concerns was clearly made. Indeed, control of important employments went further then than it has ever gone since. The gild merchants controlled the sale of staples with a system of rules to protect the purchaser, just as the craft gilds saw to it that there was enough manufactured to supply the needs of the population. All this regulation of affairs by the state was felt to be for the benefit of the public as a whole, who could thus obtain, without favor at reasonable prices, proper service in accordance with their requirements. Thus the baker and the miller in the coun-

ry villages were bound to serve all that applied or nswer for it in the courts. Likewise the surgeon nd the tailor in the towns had to answer to all calls pon their professions, or else subject themselves o the penalties of the law. Innkeeper and carrier hen as now were at the service of the public, the nnkeeper being subject to indictment if he turned way a weary wayfarer. Some of these employments are no longer on the list, and many others ave been added. For it is the economic conditions f a given time which determine what businesses must be subjected to the coercive law of public ervice, and what employments can be left to the eneral regulation of natural forces. Times change, nd the application of the law varies. At one ime we are regulating canals and turnpikes, at a ater time railroads and steamboats. At one time we are regulating the price of bread and boards, at another time of gas and electricity. But the undamental principle remains, that, whenever in ny employment the conditions give those who conduct it virtual control over their patrons in a matter necessary to their welfare, the law steps in and compels the performance of that service in accordance with the requirements of the public.

3. **The public services of the present day.**—Whatever way we turn today we depend upon a service that is public in character. Not only in long travels but in short journeys we employ common carriers—railroads and steamships, coaches and cabs, aeroplanes, buses, streetcars, the subway and the elevated train. If we ship goods there are

various transportation services at our disposal—railroads and ships, express companies and dispatch lines, refrigerator lines and tank cars. If we are journeying we eat at hotel restaurants, and put up at public inns, or travel by railroad and lodge ourselves in sleeping cars. Our freight in its transit has its needs attended to—for our goods, warehouses, for our grain, elevators, for our cattle, stockyards, and for our exports, docks. In almost every community, even relatively small, we have for our household needs gas, electricity, water supply and sewerage service provided for us, usually (except the last two) by private companies in public service, and subject to the law governing public service, even when provided by the municipality itself. For speedy communication in our business and pleasure, we have the telephone and telegraph in common use, and ticker service and messenger call for special needs. One may judge by this incomplete list how common to every part of our modern life are the various public services, and how necessary it is that they should be required by law to serve us all with adequate facilities for reasonable compensation and without discrimination.

4. **Control of the public services necessary.**—The test here suggested is this: whether a business is public or not depends upon the situation of the public with respect to it. Wherever there is in private hands substantial control of public necessities it may well be said that the public has now an interest in the conduct of these businesses by their owners. Since these agencies are carried on in a

manner to make them of public consequence, they have become affected with a public interest. Therefore, as the old books say, having devoted their property to a use in which the public has an interest, the owners in effect have granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created. Only a generation ago the general feeling as to every sort of industrial relation was that it was better to leave people to work out their own industrial salvation. But of late years we have been calling upon the state to save us from the abuse of monopoly in all its forms, and we are impatient if the state delays. It is only a few years since that we have had any detailed law for the regulation of public services. If they did not refuse to render their usual service, and did not charge extortionate prices, little fault was ever found with them in the last generation. Now we are demanding of them the utmost service which they are capable of rendering, upon the terms of full equality for the whole public. If they do not increase their facilities to meet the needs of their growing business, and if they give one customer in any way the least advantage over another, we sternly call their owners to account.

5. **The effect of natural monopoly.**—The case for public service is plainest in those few utilities where there are natural limitations upon the sources of supply which are essential to the business. This situation in itself gives some degree of monopoly to those who control the sources of supply

most accessible to their market, in preventing effective competition with the local service already established. Thus those who control the most advantageous watershed have a natural monopoly of the supply of water in a given district; and so by established law the waterworks organized to distribute water to a community must supply all that apply to the extent of their undertaking.[1] So too an irrigation system by which a stream is impounded and its water is distributed over lands within its flow has a public character.[2] Sites where waterpower may be developed to greatest advantage are necessarily limited; and, if the enterprise contemplates the sale of waterpower at a certain canal to various users, it would seem that there should be no discrimination therein.[3] For like reasons those who have preempted the natural gas fields must deal without discrimination with the public which they have assumed to serve therefrom.[4] All members of the public within the range of the operations of these systems may demand that the law put them upon an equality with their neighbors in obtaining these services so necessary to their welfare. For were not the law ready to act in their behalf there would be the gravest danger of intolerable injustice.

6. **Difficulty of distribution as a factor.**—Another natural limitation upon competition results from the character of the product. If the physical

[1] Haugen v. Albina Light & Water Co., 21 Ore. 411, 28 Pac. 244, LEADING ILLUSTRATIVE CASES.

[2] Wheeler v. No. Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

[3] Sammons v. Kearney Power & Irr. Co., 77 Neb. 580, 110 N. W. 308.

[4] State ex rel. Wood v. Consumers Gas Trust Co., 157 Ind. 345, 61 N. E. 674

haracteristics of the product are such that it can nly have a local distribution the barrier against utside competition may fairly be said to be natural. What after all is that element in the situation which akes the selling of gas a public employment,[5] while he vending of candles is a private business? Is it ot that the box of candles may be sent from any actory to compete in any market, while a thousand ubic feet of gas can only be obtained in any particular community from the pipes of the local company. Much the same argument could be made in differentiating the supplying of electricity[6] from the ale of energy in the shape of coal; and indeed electric lighting was held to be a public service from the rst moment of its installation upon a public basis. Electricity must be distributed over a wiring system as it is made; it cannot be transported independently and stored indefinitely. The purpose for which the supply is used would seem to be immaterial so long as a public need is satisfied. Nevertheless, there have been some doubts raised about he public status of an electric company supplying power exclusively.[7] To give a modern example of a public employment made such by the pecial character of the product supplied and the peculiar necessities of the local public, one might nstance the ice-plants in the southern cities.[8] It

[5] Shepard v. Milwaukee Gas Light Co., 6 Wis. 539.

[6] Cincinnati, etc., R. R. Co. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 121, EADING ILLUSTRATIVE CASES.

[7] Jones v. North Georgia Electric Co., 125 Ga. 618, 54 S. E. 85, holding uch service public as the majority of courts do; but see Brown v. Gerald, 00 Me. 351, 61 Atl. 785, holding to the contrary.

[8] Rhinehart v. Redfield, 93 N. Y. App. Div. 410, 87 N. Y. Supp. 789.

is predicted with confidence that ice-plants will henceforth be found upon the list of those businesses so important to the public that they can no longer be left to private hands without public control.

7. Scarcity of advantageous sites.—The sites upon which certain services can be conducted to best advantage are few in number. In Munn. v. Illinois[9] (perhaps the leading case upon public employment) the Supreme Court spoke of the grain elevators as taking toll at the gateways of commerce. Likewise the owners of the established docks[10] obviously command the situation; and this is the explanation of the fact that wharfingers are held to serve the public. The necessity of these locations to proper conduct of the business may be so great that those who are possessed of these sites may well be said to enjoy a natural monopoly; since if others venture to establish themselves at all at such disadvantage, their competition will be comparatively ineffectual. At all events, those in the favorable locations could exact higher prices than would be fair, were it not for the fact that the law intervenes. Terminal facilities, such as union stations,[11] furnish the most striking examples of this importance of particular sites; and there are cases compelling them to take in all railroads desiring entrance. To a lesser extent this is true of those services, which although not dependent upon an

[9] 94 U. S. 113, LEADING ILLUSTRATIVE CASES.
[10] Macon D. & S. R. R. Co. v Graham & Ward, 117 Ga. 555, 43 S. E. 100
[11] State ex rel. v. Jacksonville Terminal Co., 41 Fla. 363, 27 So. 221.

xact location, are operated with peculiar advan-ge in particular areas, such as stockyards.[12]

8. **Limitation of available time.**—Another ob-ous restriction upon effective competition results om limitation of time. When the need of the ap-licant is immediate, the person from whom he asks ervice has an unfair advantage. It is this instant eed which gives to those agencies established for ne rapid transmission of intelligence that virtual onopoly which the earlier telegraph[13] and the later elephone[14] have always had. The very nature of neir business is such that one must deal with the stablished plant upon whatever terms its owners re allowed to make. This is equally true of news-athering agencies, such as the press bureau[15] and ne stock tickers.[16] There are those who must have is service in their business or they cannot get on t all in competition with their rivals. Thus the law ust step in and see to it that only reasonable rates re imposed. In these businesses public regulation f the service furnished is peculiarly necessary, or lse public needs will not be met. There are other ays of sending communications—by mail or by essenger—but since time is of the essence here ey are not effective substitutes. It is not acci-ental that the telephone cases and the associated

[12] Ratcliff v. Wichita Union Stockyards Co., 74 Kans. 1, 86 Pac. 150.

[13] Green v. Western Union Telegraph Co., 136 N. C. 489, 49 S. E. 165, EADING ILLUSTRATIVE CASES.

[14] State ex rel. Gwynn v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, EADING ILLUSTRATIVE CASES.

[15] Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. 2, LEADING ILLUSTRATIVE CASES.

[16] Shepard v. Gold & Stock Telegraph Co., 38 Hun 338 (N. Y.).

press cases furnish the best discussion of the fundamental basis of the special law of public employment. Obviously this coercive law is imperatively required to meet the monopolistic conditions surrounding these peculiar services.

9. **Economic limitations create public employment.**—The conditions which may produce virtual monopoly, such as natural sources of supply, restricted opportunities of access, limited time at disposal and difficulties in distribution have just been discussed. But of almost equal importance are other factors producing true economic monopoly by deterring effectual competition, such as the cost of the plant, the large scale upon which the business is done, the absence of effectual substitutes and the dependent position of the particular service. These elements in the general situation have doubtless already been taken into account unconsciously; but they are of such importance as to deserve mention. These economic forces of various sorts may, either singly or in combination with others, naturally result in a given business in a monopoly of a sort which bids fair to be permanently characteristic of that employment. In these businesses with which we are dealing, the larger the scale upon which the business is done, the lower the cost of performing the service. In such businesses there must be such great sums expended in construction of the plant that none would venture to sink an equal sum in a competing service at the risk of total loss in case of failure. The common fact therefore in all instances of public employment is virtual monopoly

so established in the nature of things that society must reckon with it. And it matters not by what conditions this situation is established so that it has the elements of permanence.

10. **Legal privileges accompanying public employment.**—That legal privileges frequently accompany public employment is a coincidence that has struck many observers as a characteristic of the whole class. It is, indeed, common to find in the case of public employments of all sorts the enjoyment of an exclusive franchise, or the exercise of eminent domain, the use of the streets, or even a direct grant from the public treasury. The common argument is that because these businesses have been granted these privileges they have thereby acquired their public character. It is submitted, however, that under our constitutional system no special privileges can be granted except for a public purpose; for, unless there is public interest apparent, the grant is void. We have seen already that the conditions of virtual monopoly, however caused, may give rise to public calling, even when the state has had no hand in the establishment of the situation. There are extrinsic conditions by which it is to be determined what businesses are affected with a public interest; and the law must here as elsewhere deal with existing facts. Public privileges may be given only to a business public in character; and public regulation of such businesses only is justifiable. The power to recognize what those businesses are depends upon our experience and what our insight into the situation teaches us.

CHAPTER II.

PUBLIC PROFESSION.

11. Public profession an essential.—It has been insisted upon from the earliest times that we must find public service voluntarily undertaken in order to hold one to the special obligations of this peculiar law. The early cases spoke of the profession of his trade for the public good which one made by publicly vesting an interest in himself in all that would employ him. An innkeeper who erected his sign, it was said, thereby charged himself to the commonwealth, and his property was therefore in effect dedicated to public use. The same principles still prevail, although our modern language is less picturesque. Even one who has acquired a virtual monopoly is not forced into public service against his will; it is only when he has committed himself to public service that he is bound thereafter to deal with all indiscriminately. There is no complete case of public employment made out even when the business is public in character, if there has been in that particular case no profession to serve the public. Thus a lumberman may have a railway upon his lands without being under any obligation to transport goods for others. The converse of this is true, that there is no case of public employment made out if the business is private in character, however much eagerness to deal with the public may

have been evinced. No matter how flamboyant its advertisements, a dry goods store will not become thereby a public enterprise, subject to the peculiar obligations of public service, which our law imposes to prevent oppression.

12. **Solicitation of the public.**—When there has been general solicitation of the public there can be little doubt of the public profession. It is thus that a steamship line which advertises for freight indicates its character.[17] And so a waterman who had the sign "lighterman" over his door was held to have professed public employment.[18] The fundamental question here is whether the solicitor goes about making special contracts, or whether he lets people know generally that he is ready to deal with all comers as in regular course of business. Where a carter[19] was soliciting business publicly in various ways, by signs upon his wagons and upon fences, by his cards and tags, it was held that these advertisements spoke for themselves, and unquestionably established the fact, independent of everything else in the case, that the truckman held himself out to the public. And where the proprietors of a hotel[20] ran a coach to the station to induce guests to come to the house and had a public register for all to sign, the court had little doubt that it was a public inn. Indeed, business campaigns are common enough in public employment, as everyone who follows advertising affairs must know.

[17] The Cape Charles, 198 Fed. 346.

[18] Ingate v. Christie, 3 Car. & K. 61 (Eng.), LEADING ILLUSTRATIVE CASES.

[19] Lloyd v. Haugh & K. S. & T. Co., 223 Pa. St. 148, 72 Atl. 516.

[20] Fay v. Pacific Imp. Co., 93 Cal. 253, 26 Pac. 1099.

13. **Characteristics of public employment.**—Indiscriminate dealing with the general public is the chief characteristic of public service. The criterion is whether service is rendered particular persons chosen, or whether there is service offered to every one who comes along. Thus one who is transporting goods from place to place for hire as his principal occupation, for all that see fit to employ him, is a common carrier.[21] By the same token the establishment by the innkeeper of a regular price for his entertainment is proof that the house is being conducted as a public one.[22] The test in all cases, as will have been seen, is whether the service is being performed upon the regular basis of public employment. So a water company which accepts a charter for the supply of certain territory thereby commits itself to serve that community.[23] An irrigation company which has taken all applicants as they come along on the same terms has clearly put the enterprise upon a public basis.[24] If the service is thus habitually performed upon a public basis, the community affected is led to rely upon its continued maintenance upon a public basis. There has been a profession made to serve the public when the evidence shows that the public would naturally get the impression that the service is offered to all.

14. **Indications of private business.**—The chief characteristic of private dealing is the usual neces-

[21] Robertson & Co. v. Kennedy, 2 Dana 430 (Ky.), LEADING ILLUSTRATIVE CASES.

[22] Johnson v. Chadbourn Finance Co., 89 Minn. 310, 94 N. W. 874.

[23] Lumbard v. Stearns, 4 Cush. 60 (Mass.).

[24] Slosser v. Salt River Valley Canal Co., 7 Ariz. 376, 65 Pac. 332.

sity for special agreement with the proprietor, no regular course of business being followed. There is not the element of permanency in such dealing; it is generally regarded by all concerned as an incidental relation. Thus where a vessel is chartered for a special voyage, the charter being necessarily an isolated contract, the owner of the vessel is plainly not engaged in common carriage.[25] So a farmer who occasionally takes in for the night travelers coming his way is not held liable as an innkeeper—even if he usually accepts money therefor—since he plainly is not making tavern keeping his regular means of getting his livelihood.[26] Electric power is not being supplied upon a public basis where the whole output is delivered to a few concerns by special arrangement.[27] And telephone lines are commonly enough run through the neighborhood in rural districts as a private service for the particular subscribers.[28] A casual undertaking is not public service, nor is an intermittent employment. There must be a regular course of dealing in order to give commonly the impression that the service is being offered to all comers. Only in such cases does the public rely upon the service as always at its disposal.

15. **Extent of public profession.**—Just as people cannot be forced to serve unless they have made public profession, so they cannot be forced to serve beyond what their profession covers. One by enter-

[25] Allen v. Sackrider, 37 N. Y. 341, LEADING ILLUSTRATIVE CASES.

[26] Lyon v. Smith, Morris 184 (Iowa).

[27] Avery v. Vermont Electric Co., 75 Vt. 235, 54 Atl. 179.

[28] Cumberland Tel. & Tel. Co. v. Cartwright Creek Tel. Co., 128 Ky. 395, 108 S. W. 875.

ing a public employment does not thereby undertake to perform every kind of service that may be asked of him; his obligation only extends to the sort of service that he has undertaken. Thus a trucker need not take as a common carrier unwieldy articles, much larger than the sort of thing he has facilities for carrying.[29] And so an express company, never having professed to take glass, need not assume responsibility for its breakage.[30] Railroads are undoubtedly created for the purpose of carrying all kinds of personal property; the American cases therefore hold that the railroad companies must take live stock upon a public basis.[31] And if a railroad is carrying parcels upon passenger trains, it cannot while taking the newspapers of one publisher refuse those of another.[32] It would follow that in every service of a public character the public generally may insist upon the performance of everything of the sort they would naturally expect to be done judged by what is being done. There is, indeed, a certain scope in every service so naturally expected that one undertaking the service commits himself to conducting the particular business according to its normal standard.

16. **The case of separable services.**—One is thus not necessarily committed to going beyond the general class within which his usual services fall; but he obviously may if he chooses expand his business

[29] Tunnel & Short v. Pettijohn, 2 Harr. 48 (Del.).

[30] People v. Babcock, 16 Hun 313 (N. Y.).

[31] Kansas Pac. R. Co. v. Nichols, Kennedy & Co., 9 Kans. 235.

[32] Memphis News Publishing Co. v. Southern Ry. Co., 110 Tenn. 684, 75 S. W. 941, LEADING ILLUSTRATIVE CASES.

to cover other separable services. A railroad is not necessarily a carrier of both passengers and goods, it may confine its service to one or the other. Thus there are freight railroads which carry no passengers, just as street railways need carry no freight.[33] But the innkeeper's business is held indivisible; he must supply both food and lodging, or he is not an innkeeper. Thus neither a lodging house nor a restaurant is an inn, notwithstanding there is in either case advertisement enough for general patronage.[34] A water company supplying householders and shopkeepers for domestic uses need not supply manufacturers and farmers for their peculiar needs.[35] And a gas company may confine its profession or be limited by its charter to the supply of gas either for illumination or for fuel.[36] Of course where two services have been voluntarily undertaken, both services or either are at the disposal of the public. The public have a right to the service which has been professed, although without the profession such extension of the service would not be obligatory.

17. **Profession limited to facilities devoted.**—One may set the exterior limits to the profession one is making; but one may not make interior limits. In other words, one is not bound to service outside of the profession which has been made, while one

[33] Compare Wiggins Ferry Co. v. East St. Louis Union R. Co., 107 Ill. 450 (freight railroad) with Thompson Houston Electric Co. v. Simon, 20 Ore. 60, 25 Pac. 147 (passenger railway).

[34] See Davis v. Gay, 141 Mass. 531 (a lodging house) and Block v. Sherry, 43 N. Y. Misc. 342 (eating house).

[35] In re Barre Water Co., 62 Vt. 27, 20 Atl. 109.

[36] State v. New Orleans Gas Light Co., 108 La. 67, 32 So. 179.

is bound to serve within the profession. This distinction may be illustrated by pointing out that a railroad is not bound to carry beyond the route which it has established.[37] But it must have cars enough to handle all business along its lines. Similarly a water company need not supply applicants outside the city, even if its aqueducts pass their premises;[38] but certainly it could not within the city refuse to supply applicants in a district through which its pipes run. So, too, an innkeeper is not bound to serve beyond the capacity of his house; but until it is exhausted he ought to receive all without discrimination.[39] A power company is not liable for not supplying new applicants after the flow of the stream is exhausted, although bound to accept applicants in proper order up to its capacity.[40] Perhaps in these last two instances it may also fairly be said that the extent of the innkeeper's profession is the dedication of his actual house to public service, and the whole profession of the power company is to divert the particular stream. Therefore, neither can be called upon to serve beyond its profession, while within its profession its public duty is plain.

18. **Obligation of community service.**—In various public services, however, the obligation assumed is obviously to serve the community as a whole. A gas plant or a waterworks, an electric

[37] Pittsburg C. & St. L. Ry. Co. v. Morton, 61 Ind. 539.

[38] West Hartford v. Water Commissioners, 68 Conn. 323, 36 Atl. 786.

[39] See Browne v. Brandt, (1902) 1 K. B. 696 (Eng.), LEADING ILLUSTRATIVE CASES.

[40] See Brown v. Gerald, 100 Me. 351, 61 Atl. 785.

lant or a telephone system, cannot confine its serv-e to the original lines; it will be obliged to increase s plant to meet the increasing demands of its pub-c. This extension of the profession depends on ne intention of the proprietors, or rather upon ne impression which they give their community. heir original franchise is taken upon the basis of general obligation to serve the community. They eally undertake to meet the needs of the com-nunity they are serving. Of course these com-anies must at least furnish service at all premises ithin the lines which mark the territorial limits f the established system.[41] But it would be going o far to say, as one case did, that all within the nunicipal limits, however remote from the estab-shed mains, may demand service.[42] The modern aw, however, requires that the existing service must e extended with the expansion of the densely opulated area.[43] Probably the best rule for this natter is that contained in a recent decision sug-esting that this expansion must keep pace with he reasonable expectation of eventual profit.[44]

19. **Withdrawal of the profession.**—Since one omes into public service only by voluntarily en-aging in the particular business upon a public asis, it would seem to follow that one could get out f public employment simply by publicly withdraw-

[41] Crouch v. Arnett, 71 Kans. 49, 79 Pac. 1086, LEADING ILLUSTRATIVE ASES.

[42] Bothwell v. Consumers Co., 13 Idaho 568, 92 Pac. 533.

[43] Birmingham Water Wks. v. Birmingham, 58 So. 204 (Ala.).

[44] Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57 tl. 482.

ing his original profession. In a recent case in the Supreme Court it was assumed as unquestionable that a wharf which had once been a public landing could be turned back to private use.[45] The existence of a charter seems to complicate the situation, although it is not apparent why it should. Where the charter is mandatory it must be obeyed and the whole service maintained even though at a loss, at least until the company is prepared to forfeit its charter. But where the charter is permissive it would seem that there is no obligation other than the general obligations which have just been discussed. Nevertheless there are many cases holding that railways must maintain their whole service; and they cannot according to these cases, therefore, abandon a branch line.[46] It would seem, however, as the better authorities hold, that any separable part of the service may be abandoned, as for instance passenger service upon a railroad line.[47] Surely where the business is now conducted upon a private basis, as a private pipe line system, for example, there should be no power to compel involuntary service.[48]

20. **Reasonable notice of withdrawal.**—The parallel between entering public service and quitting it is not quite perfect; for although one may enter upon public service on public notice without preparing the public for his advent, one may not,

[45] Weems Steamboat Co. v. People's Steamboat Co., 214 U. S. 345, 29 Sup. Ct. 661.

[46] Colo. & So. Ry. Co. v. R. R. Commission, 54 Colo. 64, 129 Pac. 506.

[47] Com. v. Fitchburg R. R., 12 Gray 180 (Mass).

[48] Prairie O. & G. Co. v. United States, 204 Fed. 798.

seems, abandon public service without notice to the public. The new element of a public duty now existing has supervened, which must be reckoned with when one who has assumed a public employment would lay it down. An innkeeper cannot without notice take down his sign at nightfall, nor carrier abandon his schedule without warning to is public. This means that there is a public duty n the matter to give reasonable notice of the intenion to abandon, which is owed the public, although fter reasonable notice the public may be left to get ervice elsewhere. There are instances in the books f the granting of temporary orders to prevent a water company which had threatened cutting off an stablished service from taking sudden action.[49] And so a railroad will be enjoined from taking up a pur over which shipments are now being made.[50] Where one service is substituted for another, however, as where a new line is built in place of an old, ittle notice need be given.[51] And electric companies may divide territory between themselves without consulting their patrons.[52]

[49] Bienville Water Supply Co. v. Mobile, 112 Ala. 260, 20 So. 742.
[50] Durden v. Southern Ry. Co., 2 Ga. App. 66, 58 S. E. 299.
[51] Whalen v. Baltimore & O. R. R., 108 Md. 11, 69 Atl. 390.
[52] Weld v. Gas & Electric Light Commissioners, 197 Mass. 556, 84 N. E. 01, LEADING ILLUSTRATIVE CASES.

CHAPTER III.

PUBLIC DUTY.

21. **Nature of public duty.**—It has thus always been the law that some kinds of business were of special importance to the public, and that all persons engaged in such businesses owed the public peculiar duties. And, as has been seen, although no one can be compelled to enter upon the employment, if he chooses to do so, he thereby undertakes the performance of the public duties connected with it. The situation is one which the law must meet by imposing obligations corresponding to the necessities of the case. The law makes it clear that any one who decides to undertake a public employment thereby commits himself to performing that service in the way which the law says that the conditions demand for the protection of the public. This duty placed upon everyone exercising a public calling is primarily a duty to serve every man who is a member of the public needing that service. Implicit in this primary duty, necessarily involved in its full performance, are various requirements. Not only must all be served, they must have adequate service; not only must they not be charged extortionate rates, but there must be no discrimination practiced. In such an elaborated statement there is not more than the plain recital of the present recognition of different aspects of public duty. But it will

be noted that the duty to serve the public is the fundamental principle from which all the rules of public service may be derived.

22. **Character of the obligation.**—It is somewhat difficult to place this exceptional duty in our legal system. It is like the contractual obligation in that it is an affirmative duty to act for a certain person; but it is different in that it does not depend upon assent of the party charged. It is like the obligation in tort in that it is imposed by law; but it is not cast upon anyone against his will as is the obligation in tort. In one sense the obligation to serve the public is voluntarily assumed; one is not committed to this service without his assent. But once this obligation is established by his undertaking, his duty extends to all within the profession, however unwilling he may be in a particular case to render service. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it.[53] Therefore injuries received in cases of this description are not violations of contracts between the parties, but are breaches of the duty imposed by law upon the carrier; they are torts.[54] Thus one who is injured while being carried on Sunday can recover for the failure of the carrier in performing his undertaking, as he is not forced to make out his case by showing a contract.[55]

[53] The language is that of Chief Justice Dallas in Bretherton v. Wood, 3 Brod. & Bing. 54 (Eng.), LEADING ILLUSTRATIVE CASES.

[54] The language is that of Chief Justice Taney in Saltonstall v. Stockton, Taney 11 (U. S.).

[55] Carroll v. Staten Is. R. R. Co., 58 N. Y. 126.

And so the obligations of an innkeeper towards his guest are those which the law attaches to this status, irrespective of whether the parties in the particular instance may have made any agreement covering the contingency.[56]

23. **Real party in interest.**—It is commonly said of public employments that the whole public is peculiarly interested in having them carried on. But this should be no justification for giving a private right to any person not clearly entitled thereto. Most of the American cases permit the sendee of a telegram to recover damages for fault of the company in the transmission of the message.[57] But such an action it seems may only be justified when it appears that the sendee and not the sender is the real party in interest. A similar conflict arises when a suit is brought by a householder whose premises have been destroyed by fire against the water company supplying the district. The cases are divided as to whether he may recover damages in his own right for the failure to maintain water pressure sufficient to cope with fires.[58] This public duty is necessarily limited to responding to the proper applications of those who are desirous of the sort of service which has been professed. A householder using electricity for lighting his house will seek in vain to have the gas company compelled by the courts to continue to maintain its connec-

[56] Holland v. Pack, Peck 151 (Tenn.).

[57] For a discussion of the authorities, see Western Union Telegraph Co. v. Allen, 66 Miss. 549, 6 So. 461.

[58] For a discussion of the authorities, see Lovejoy v. Bessemer Water Works Co., 146 Ala. 374, 41 So. 76.

ions for his occasional use.[59] And one who is applying for service with the desire simply of being refused service so as to bring a law suit, will defeat his own ends.[60]

24. **Nature of the relationship.**—The condition under which public service is performed is, therefore, not similar to contract, but is more like status. It would be difficult to find present all the essential elements of contract in arranging for public service. And it would be impossible to find all the obligations of the status in any agreement which the parties actually make. The applicant need not even have the capacity to contract; an infant or a married woman may demand service.[61] Nor need the proprietor himself be capable; a man not sane enough to make contracts or a corporation acting beyond its powers cannot escape.[62] The relationship is established by actual acceptance, although the payment is made by another person.[63] But the relationship itself is so personal that the right to have the service completed may not be assigned.[64] It is but a half truth that those who commit themselves to a public employment are bound to serve the whole public. It is but a half truth that the public servant may altogether decide as to the ex-

[59] Fleming v. Montgomery Light Co., 100 Ala. 657, 13 So. 618, LEADING ILLUSTRATIVE CASES.

[60] Southern Pacific Co. v. Robinson, 132 Cal. 458, 64 Pac. 572.

[61] Watson v. Cross, 2 Duv. 147 (Ky.), (infant). Vanderberg v. Kansas City, Missouri, Gas Co., 126 Mo. App. 600, 105 S. W. 17 (married woman).

[62] Cross v. Andrews, Cro. Eliz. 622 (Eng.), (insane proprietor); Albion Lumber Co. v. De Nobra, 72 Fed. 739 (ultra vires corporation).

[63] Mims v. Seaboard Air Line Ry., 69 S. C. 338, 48 S. E. 269.

[64] Sullivan v. Chicago Bd. of Trade, 111 Ill. App. 492.

tent to which he will commit himself to public service. The real truth is that by entering upon the service one comes within the law requiring him to meet the necessities of the situation—but no more. The obligations are thus the involuntary ones of a legal status—not the defined ones of a specific assumption.

25. **Special needs of travelers.**—The duty as thus defined is not to all men, but to a certain public limited in various ways according to the necessary profession. An innkeeper or a carrier does not owe a duty to all who apply, but only to wayfarers and travelers. The innkeeper need not entertain a resident of his own town;[65] and a carrier need not take as a passenger one who wants to sell things while he is on board.[66] It is only as to dealings with travelers that these callings have been felt to be affected with a public interest. There is special reason in the nature of the case why innkeepers should be bound to entertain weary wayfarers, and why carriers of passengers must take up travelers bound their way. Moreover, it is well agreed that the innkeeper and the carrier are under a similar duty to the patron to receive persons incidentally affected by the principal service. The innkeeper must treat one summoned by the guest to a call upon him at his inn with the same consideration as the guest himself.[67] A person who comes to the carrier's premises in order to be of assistance to the

[65] Meacham v. Galloway, 102 Tenn. 415, 52 S. W. 859.
[66] The D. R. Martin, 11 Blatch. 233 (U. S.)
[67] Markham v. Brown, 8 N. H. 523.

parting passenger, though not a passenger, is en-
led to be admitted to the station; and he may even,
order to assist a passenger, demand admittance
a train.[68]

26. **Peculiar rights of occupiers.**—In several of
e public services the obligation is limited to the
pplying of the occupiers of premises. Such is ob-
ously the case in regard to the water companies,
e gas companies, the electric companies and the
lephone companies which undertake to distribute
eir product or perform their services generally
roughout the city. They do not undertake to
rve every person as such, for it is obvious that
eir services are necessary only in connection with
e use of buildings. Their obligation is, therefore,
roperly held to be limited to the occupiers of prem-
es by the general character of their customary
ndertaking. As a Vice-Chancellor in New Jer-
y[69] said, it would be quite absurd to say that a
erson destitute of any local habitation within the
rporate limits of Jersey City has the least right to
emand a supply of gas. According to this analy-
s of the situation the occupiers of every house
ithin the territory served have a right to be
pplied. The Montana[70] case is therefore sound
hich holds that a rule of the company to the effect
at it would only deal with owners, ignored the
ndamental rights of tenants to have the service.

[68] McKone v. Michigan Central R. R., 51 Mich. 601, 17 N. W. 74.
[69] Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57
l. 482.
[70] State ex rel. Milstead v. Butte City Water Co., 18 Mont. 199, 44 Pac. 966,
ADING ILLUSTRATIVE CASES.

Making occupancy the test gives rise to some nice problems as to the supply to apartment houses[71] or to buildings with common ownership.[72] If there are separate holdings there should be separate supply; there is no obligation to supply such unattached persons as mere boarders.

27. **Obligations toward dependent services.**— A special problem under the general head of the true extent of public duty is whether in dealing with dependent services those who conduct the principal service may make such arrangements as they please with those who apply for such special privileges, or whether there is a public duty in the premises requiring that equal facilities shall be granted. The railroad company surely owes no duty to expressmen themselves, as is shown by the fact that the railroad may do all the express business on the line itself. On the other hand, passengers coming in their own vehicles could not be refused entrance to a station; and cabs ordered to meet passengers may come in and await them. Even when it is once established that there is a public duty toward their own patrons in respect to the subsidiary service involved, there remains the conflict of authority as to the extent to which this duty goes. According to the conservative view, the principal company fulfills its duty by making proper provision for the service desired. Thus a railroad by many courts is allowed to make an exclusive contract with one hack concern to use the station

[71] Ferguson v. Metropolitan Gas Light Co., 37 How. Pr. 189 (N. Y.).
[72] United States v. American Water Works Co., 37 Fed. 747.

grounds.[73] According to the progressive view, the whole law of public service applies to the situation and any discrimination between hackmen is therefore condemned.[74] An exclusive contract with one express company for the use of passenger trains is held in many jurisdictions legal as a sufficient provision for express service.[75] But in the radical courts such arrangements are condemned as fostering a monopoly which will inevitably exploit the public affected.[76]

28. **Furnishing of incidental services.**—The real truth of this difficult matter seems to be that while public duty is involved in regard to some dependent services to such an extent that the whole law of public service should apply, there are other incidental services as to which there is no public obligation to prevent the making of such exclusive arrangements. It seems that equal access to railroad wharves should be given to competing steamboat lines; but the decisions as to that are conflicting.[77] Perhaps the private car business ought not to be turned over to favored concerns without competition, as it is under the favoring auspices of the conservative courts.[78] To be sure there seems to be

[73] New York, New Haven & H. R. R. Co. v. Scovill, 71 Conn. 136, 41 Atl. 246.

[74] Montana Union Ry. Co. v. Langlois, 9 Mont. 419, 24 Pac. 209, LEADING ILLUSTRATIVE CASES.

[75] The Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, LEADING ILLUSTRATIVE CASES.

[76] McDuffee v. Portland & R. R. R. Co., 52 N. H. 430.

[77] See Louisville & N. R. R. v. West Coast Naval Stores Co., 198 U. S. 483, 25 Sup. Ct. 745.

[78] Chicago St. L. & N. O. R. R. Co. v. Pullman Southern Car Co., 139 U. S. 79, 11 Sup. Ct. 490.

no objection to giving exclusive privileges for bootblacks in hotels.[79] But an inn must admit competing telephone companies to equal privileges.[80] The difference between these two classes of cases is obvious enough. There is a public necessity subserved in one class, while in the other class there is no real need at all. Even in the case of services which are public, there are some matters which are not obligatory. A railroad need not permit all baggage men to go upon the trains to solicit business before the station is reached. An express company cannot demand a booth in a terminal station, even if competitors have one.

29. **Rights of connecting services.**—The problem of connecting services cannot be dismissed by saying that for a carrier to make arrangements for interchange of business with one connection while refusing to do the same with another is illegal discrimination, for this is true only to the extent that public duty is involved. A railroad may not refuse altogether to have dealings with its connections—to accept goods from them or to deliver goods to them. Obviously this will not do; it is the duty of the railroad as a common carrier to accept and deliver goods at every station on its route for all patrons alike.[81] The patron may himself decide by what successive parties he wishes the service performed, and from these directions the carriers de-

[79] State v. Steele, 106 N. C. 766, 11 S. E. 478.

[80] Central N. Y. Tel. & Tel. Co. v. Averill, 199 N. Y. 128, 92 N. E. 211.

[81] A contract by a carrier not to receive goods destined beyond its own line is void. Seasongood v. Tennessee & O. Transp. Co., 21 Ky. Law Rep. 1142, 54 S. W. 193, LEADING ILLUSTRATIVE CASES.

sate at their peril. Thereupon the law necessarily rows upon each carrier in turn the duty of tenering the goods for further transportation to the ceeding carrier; and normally, until it effectuces such delivery, the original carrier remains liae as a common carrier.[82] The traditional rule at mmon law has been that there is no obligation permit physical connections between railroads.[83] ut if there is a sufficient amount of business that ould usually be tendered at a junction should a ation be opened, according to the more advanced iews now held there ought to be a joint station stablished.[84]

30. **Arrangements for through service.**—At common law one public service could not be compelled enter into arrangements with another for continuous service as a single unit for a single rate. Through arrangements were left altogether to such rivate agreements as the parties should negotiate.[85] So far as the common law was concerned either hrough service was undertaken voluntarily by the nitial carrier solely, as the English cases presumed t was when nothing was said to the contrary, or it vas a case of successive carriage where each carier was liable in turn, as the American cases genrally presume in the absence of evidence.[86] It was

[82] See Western Union Telegraph Co. v. Simmons, 93 S. W. 686 (Tex. Civ. pp.), applying the same law to telegraph companies.

[83] Atchison, T. & S. F. Ry. Co. v. Denver & N. O. Ry. Co., 110 U. S 667, Sup. Ct. 185.

[84] Concord & M. R. R. Co. v. Boston & Maine R. R. Co., 67 N. H. 464, 41 tl. 263, LEADING ILLUSTRATIVE CASES.

[85] Southern Ind. Exp. Co. v. United States Exp. Co., 92 Fed. 1022.

[86] This point is discussed fully in Nutting v. Connecticut River R. R., 1 ray 502 (Mass.).

possible for two carriers to establish through routes at joint rates; but there was no compulsion about it. It followed that a carrier could do as it pleased without being open to the charge of discrimination for choosing a certain carrier to be associated with it in through service under a joint rate with it.[87] But by the modern statutes, the regulating commissions are given power to establish joint rates and even to dictate as to the division thereof,[88] all of which is held constitutional on the ground of public interest in through service.

[87] Southern Pacific Ry. Co. v. Interstate Commerce Commission, 200 U. S. 536, 26 Sup. Ct. 330, LEADING ILLUSTRATIVE CASES.

[88] Interstate Commerce Commission v. Northern Pacific Ry., 216 U. S. 538, 30 Sup. Ct. 415.

CHAPTER IV.

CONDITIONS PRECEDENT.

31. **Performance of conditions prerequisite.**—It ll be found, moreover, that there are many con- tions precedent to the obligation of any particu- r public service company to serve any particular plicant. There is no obligation to render service a particular applicant until he has put himself a proper position to demand that service. It is e law again which determines under what condi- ons the service company may properly be held to spond to an application. In most services the law as made it plain what conditions there are as to me and place, method and manner. All these con- tions must be performed by the particular appli- nt, though he be of the class to which the duty ertains, before a present duty is owed him, even ough he wishes a service in respect to which there as been public profession of a general sort. Un- oubtedly the most noteworthy example of these nditions which must be performed is the neces- ty of an offer of prepayment before any service ill be due. Stated technically, the company render- g the service is therefore not in default until per- rmance of the conditions precedent has been ten- ered. What conditions are thus insisted upon de- end upon how the law has thought proper to feguard all concerned.

32. **Service asked at proper time.**—The rule of the early cases was that a carrier could not be compelled to receive goods until it was ready to set out, even if it happened that it had storage facilities. In modern times, however, it is usually held necessary for the railroads, at least, to provide facilities for receiving goods in advance of the departure of their freight trains.[89] This obligation to receive goods in advance is only for a reasonable period; it still remains true that the carrier is not a warehouseman by profession. To state a close point, there are conflicting decisions as to whether an express company may enforce a rule that money will not be received on any day after the departure of the trains carrying express matter, the question being whether the company need be prepared to protect currency in the local office over night.[90] On the other hand, the carrier by rail may require that freight be delivered to it at a time sufficiently prior to the departure of its trains to enable it to make preparations for shipments.[91] No person desiring to become a passenger upon a train may rightfully demand a delay of one minute to enable him to reach the train and get on board.[92] It is of course very common to find in the conduct of a public service time-tables made which will govern the course of the service; and in public employments generally office hours are established to which public service

[89] St. Louis I. M. & So. Ry. Co. v. State, 84 Ark. 150.

[90] Alsop v. Southern Exp. Co., 104 N. C. 278, 10 S. E. 297.

[91] Frazier & Cooper v. Kansas City, St. J. & C. B. R. R., 48 Ia. 571, LEADING ILLUSTRATIVE CASES.

[92] Pickett v. Southern Ry. Co., 69 S. C. 445, 48 S. E. 466.

limited. In all dealings with public service companies, these time-tables govern and these office hours must be observed, provided they are just and reasonable, and give the community a sufficient service for the business which it provides.

33. **Service demanded at proper place.**—A carrier is not liable for refusing to take goods unless they have been actually tendered, or at least unless they are in the process of being tendered.[93] Usually the place which the carrier has designated in the particular instance must be resorted to, as where a carrier gave orders that coal should only be received at a certain siding.[94] It should be added that as the carrier may make regulations with regard to its performance of its obligations, it may refuse to take goods except at the stations which it has established. Those who have goods in readiness for transportation must notify the carrier of their desire to have their goods transported before it will be in default for not taking them. It would be going to an extreme to hold, as some cases do, that a deposit in the regular place for receiving goods followed by notice to the carrier is enough to make the carrier responsible as such, without proof of a special custom to that effect. In the case of passenger carriers, however, it is not uncommon to provide for the giving of a signal by the intending passenger.[95] As street railways are usually operated they owe a duty to the public to stop at

[93] Little Rock & F. S. Ry. Co. v. Conatser, 61 Ark. 560, 33 S. W. 1057.
[94] Georgia Southern Ry. Co. v. Marshman, 121 Ga. 235, LEADING ILLUSTRATIVE CASES.
[95] Southern Ry. Co. v. Wallis, 133 Ga. 553, 66 S. E. 370.

their regular crossings on a seasonable signal, given in any intelligible way.[96]

34. **Application in proper form.**—Before being obliged to install its service a supplying company may require the applicant to make a regular application in such form as the company may prescribe.[97] This will be required to be in writing almost invariably, so as to have certainty as to the requirements; and the application must be made with sufficient particularity.[98] The company may not, however, require the applicant to subscribe to unreasonable regulations, such as that there shall be access to the premises at all hours, nor to illegal stipulations, such as that the company shall not be liable for defects in the service.[99] It is not enough to tender a message to a telegraph company with a request for its transmission, although of course one must show this at least. One will be met by the usual requirement by telegraph companies that all messages tendered to them for transmission shall be in writing upon their own blanks, which are invariably provided for the purpose, unless this requirement has been customarily waived.[1]

35. **Service demanded in proper manner.**—That a carrier may refuse to receive goods for carriage unless they are properly packed, is clear enough. Thus an express company need not receive furniture

[96] Karr v. Milwaukee L. H. & T. Co., 132 Wis. 662, 113 N. W. 62.

[97] Shiras v. Ewing, 48 Kans. 170, 29 Pac. 320.

[98] Bennett v. Eastchester Gas Light Co., 54 N. Y. App. Div. 74, 66 N. Y. Supp. 292.

[99] Dittmar v. City of New Braunfels, 20 Tex. Civ. App. 293, 48 S. W. 1114.

[1] Western Union Telegraph Co. v. Dozier, 67 Miss. 288, 7 So. 325, LEADING ILLUSTRATIVE CASES.

t crated or money not sealed.[2] But the require-
nts of the carrier as to packing must be reason-
le; it may not reject a package on this ground
it is in fact reasonably safe for shipment. In
neral the loading and unloading of goods are under
e carrier's control, and it is responsible for any
jury incident thereto.[3] Primarily it is the car-
r's business to load its vehicles. A railroad may
t usually require a shipper to put his goods upon
e cars himself.[4] If the shipper assumes the re-
onsibility of loading and unloading, the carrier
thereby relieved from liability for loss in that con-
ction unless the improper loading should have
en apparent to the carrier's servant from ordinary
servation, when the carrier will be liable.[5] There
e special kinds of freight which require special
nder. If one wants his coal carried in bulk, he
ould provide facilities for loading the cars him-
lf. And in service at private switches the shipper
ay justly be compelled to accept the responsibility
erefor.

36. **Reasonable conditions may be imposed.**—
ne general principle must be taken as established
at the carrier is entitled to establish and promul-
te reasonable rules and regulations governing the
anner and form in which it will receive such arti-
es of commerce as it is bound to carry, so that

Cohn v. Platt, 48 N. Y. Misc. 378, 98 N. Y. Supp. 535.
Elgin J. & E. Ry. Co. v. Bates Machine Co., 200 Ill. 636, 66 N. E. 326.
London & L. F. Ry. Co. v. Rome W. & O. R. R., 144 N. Y. 200. Where,
vever, a special rate lower than that quoted for less than carload package
ight is made for shipments in carload lots, it is usually provided that the
ding and unloading shall be done by the consignor and consignee
pectively. See Beale and Wyman, Railroad Rate Regulation, 2d ed.,
530 and following.
Miltimore v. Chicago & N. W. R. R., 37 Wis. 190.

they may be handled with convenience; and it follows as a corollary to such authority that the carrier has also the power to modify such rules from time to time, as it may deem expedient.[6] On the other hand, improper conditions may not be imposed even by regulation, since a common carrier is under obligation to accept within reasonable limits all ordinary goods which may be tendered to it for carriage at reasonable times, for which it has accommodation; and the carrier may not generally discriminate between persons who tender freight and exclude a particular class of customers.[7] In household service where individual installation is necessarily required, it is the obligation of a supplying company to bring the supply to the premises of the applicant.[8] The company, therefore, must itself provide all the faculties requisite to the performance of its service, and any attempt to defeat this obligation by imposing conditions will fail.[9]

37. **Prepayment a universal condition.**—Of the right to demand payment before undertaking the service requested, there can be no doubt. The carrier of goods may in all cases insist upon the payment of its charges when the goods are tendered to it.[10] Even if it is a connecting carrier to which the goods are brought by the initial carrier, with the idea that the consignee shall ultimately pay, it may insist. So the carrier of passengers may make it a condition of accepting a passenger for carriage

[6] Harp v. Choctaw O. & G. R. R. Co., 125 Fed. 445.
[7] United States ex rel. v. Oregon Ry. & Nav. Co., 159 Fed. 975.
[8] Franke v. Paducah Water Supply Co., 88 Ky. 467, 11 S. W. 432.
[9] Snell v. Clinton Electric Light, Heat & Power Co., 196 Ill. 626, 63 N. E. 1082, LEADING ILLUSTRATIVE CASES.
[10] Illinois Central R. Co. v. Frankenberg, 54 Ill. 88.

that the fare be paid in advance, or that a ticket shall be purchased and presented.[11] By the same principles a telephone user must pay in advance the usual charge made for the regular period of billing prevailing, and a patron at a pay station must pay the charge for the connection as required.[12] So tender of charges must accompany a demand for water service, especially where tap service is asked which can be computed in advance.[13] Without going into more details at present, the general rule may be repeated, that in all cases the service company may refuse to act until payment is forthcoming. It would be intolerable to compel one to render service without securing to him his right to collect his pay.

38. **Waiver of prepayment possible.**—This necessity of tender may be waived in practice; and it generally is unnecessary to lay down the money before one is asked. Thus if the inn is open and the traveler enters and makes his desire to become a guest known to the innkeeper, the latter must request a tender if he means to insist upon it as a condition of receiving a guest.[14] But in no case may payment for service be demanded on credit as a right, no matter how common such a practice may have been. Even in a case of a telephone company which for years had given patrons a month's credit by the system upon which its bills were rendered,

[11] Dickerman v. St. Paul Union Depot Co., 44 Minn. 433, 46 N. W. 907, LEADING ILLUSTRATIVE CASES.

[12] Ashley v. Rocky Mountain Bell Telephone Co., 25 Mont. 286, 64 Pac. 765.

[13] Robbins v. Bangor R. & E. Co., 100 Me. 496, 62 Atl. 136.

[14] Fell v. Knight, 8 M. & W. 269, 10 L. J. Ex. 277 (Eng.), LEADING ILLUSTRATIVE CASES.

it was held that it might by a mere notice require a particular customer to pay in advance.[15] Where the waiver is plain in a particular case the full responsibilities of the undertaking will be held to have been begun without the performance of the condition. Thus where a carrier accepts goods for carriage without making demand for payment, it is liable as common carrier though the freight has not been paid.[16] So if a telegram is taken with the understanding that the basis is that charges shall be collected from the sendee, the company is bound to forward it with all dispatch.[17]

39. **The unit of service.**—As a matter of convenience public service is usually offered in fixed units. The decision of the company as to the units in which it will provide service is conclusive unless its action is unreasonable. One who wishes to go a journey may not demand the right to pay mile by mile; but the company may insist that he pay for the whole journey as a unit.[18] And one who wishes water for irrigation may not demand a day's supply; on the contrary it may be insisted that he shall take for the whole season.[19] In these two instances the unit insisted upon by the company is the natural unit of service; but there are many instances in public service where there is no natural unit, and in such cases the matter must be left to the decision of the company unless it acts outrageously. Thus

[15] Malochee v. Gt. So. Tel. & Tel. Co., 49 La. Ann. 1690, 22 So. 922.
[16] Porter v. Raleigh & G. R. Co., 132 N. C. 71, 43 S. E. 547.
[17] Western Union Telegraph Co. v. Cunningham, 99 Ala. 314, 14 So. 579.
[18] London & N. W. R. R. v. Hinchcliffe, (1903) 2 K. B. 32 (Eng.).
[19] Wheeler v. No. Colo. Irr. Co., 10 Colo. 582, 17 Pac. 487.

t would be entirely reasonable for the company to x three months as the unit of water service.[20] And telephone company may fix a year for the initial ervice at the time of installation.[21] Considered as n existing fact, the unit established is an entirety; ayment of the whole unit must be tendered in rder to be in a position to demand any service. And the fare for the whole journey must be paid henever demand is made.

40. **Payment of arrearages demanded.**—It would eem that the applicant is entitled to present serv- e upon payment for the present unit, regardless f whether he owes for past services. And it would eem to follow that to refuse future service when resent payment is offered therefor until arrears hall be paid, is, for a public service company, ille- al. But as to the legality of such a policy in the anagement of a public employment, there is a sur- rising conflict of authority. On one hand are the ecisions which hold that in refusing to serve those ho come with ready payment, the company in ques- ion acts contrary to its public duty, which is to erve without discrimination all that apply.[22] But here are other cases equally insistent in holding hat, if the present applicant owes for a supply iven him, he is in no position to demand a fur- her supply, even if ready money is tendered for it.[23]

[20] Harbison v. Knoxville Water Co., 53 S. W. 993 (Tenn. Ch. App.), EADING ILLUSTRATIVE CASES.

[21] Buffalo County Telephone Co. v. Turner, 82 Neb. 841, 118 N. W. 1064.

[22] Crow v. San Joaquin & K. R. C. & I. Co., 130 Cal. 309, 62 Pac. 562.

[23] People v. Manhattan Gas Light Co., 45 Barb. 136 (N. Y.), LEADING LLUSTRATIVE CASES.

Although this is clearly in the face of public duty, much is made in these cases of the argument of the convenience to the company in making its collections. It is agreed, however, that an applicant need not settle the unpaid bills of the previous tenant of the premises.[24] Nor may disputed claims be enforced by refusing further service until settlement is made.[25]

[24] Poole v. Paris Mountain Water Co., 81 S. C. 438, 62 S. E. 874.
[25] Mansfield v. Humphreys Mfg. Co., 82 Oh. St. 216, 92 N. E. 233.

CONDUCT OF PUBLIC SERVICE

CHAPTER V.

COMMENCEMENT OF THE SERVICE.

41. **When service is begun.**—The question is often raised whether in a particular case the regular relationship of the public sort has actually been established by the undertaking of the service asked. The modern railroad habitually receives passengers at stations, and so is liable from the time the traveler comes upon the premises. On the other hand, it does not commonly undertake to be liable for goods until some employee takes them in charge. The further question then arises, whether the transaction under examination is upon a public or a private basis. Suppose that one engaged in a public employment makes a special arrangement with one whom he would have been obliged to serve—is this service upon a public or private basis? Or suppose not being obliged to serve the particular applicant he actually receives him as though he were—is this service upon a public or private basis? These distinctions are shown plainly in the law of innkeeping. Although obliged to receive a traveler as a guest, the innkeeper may, by special arrangement

with him, receive him as a boarder. On the other hand, although not obliged to receive a neighbor as a guest, an innkeeper may voluntarily receive him as such, which would usually be shown by the signing of the register.

42. **Acceptance as common carrier.**—The peculiar responsibilities of the carrier of goods do not begin until the moment when it assumes possession. But its liability as such begins at once on the receipt of goods for transportation, though the goods have not yet been started toward their destination. That is, the liability of the carrier as such depends upon its possession, with the right to transport immediately.[26] But when goods are received by the carrier, not for immediate transportation but to be held pending orders of the shipper, the carrier holds the goods as a warehouseman only.[27] And where goods are offered to a railroad company at an unreasonably long time before the train starts, if the carrier actually takes the goods it becomes responsible at once as a carrier, although the carrier might have refused to take them so long in advance and the shipper knows that according to the time-table the goods will not be carried until a later time.[28] But where upon the special understanding that for the shipper's own convenience the carrier had received goods into its warehouse before the opening of navigation, to be forwarded as soon as possible thereafter, it was

[26] Shaw v. Northern Pacific R. R., 40 Minn. 144, LEADING ILLUSTRATIVE CASES.

[27] Barron v. Eldredge, 100 Mass. 455.

[28] Hickox v. Naugatuck R. R. Co., 31 Conn. 281.

not held liable as a carrier while the goods were in the warehouse.[29]

43. **Delivery to the carrier.**—The delivery to the carrier of goods or property for shipment may be actual or constructive, but there must be a delivery and acceptance of the goods. Thus delivery to the driver of an express wagon collecting goods is a good delivery to the company, as the goods have actually been received in due course of business.[30] On the other hand, the deposit of goods beside a railroad track, as upon a platform provided to receive them, though they are so deposited for immediate shipment ready to be loaded upon the freight train when it arrives, is not, in the absence of special custom, delivery which renders the carrier liable.[31] Where goods are taken out of the vehicle in which they are brought to the conveyance of the carrier, the tackling by which the transfer is effected usually belongs to, or at least is operated by, the carrier; and in that case the carrier's responsibility begins as soon as the goods are attached to the tackling;[32] and similarly where grain or liquid is shipped in bulk, being delivered through a chute, the cases hold that when the carrier has control of the mouth of the pipe it is responsible for the grain spilled.[33]

44. **Acceptance as a passenger.**—Likewise the relation of carrier and passenger may arise before

29 Ham v. McPherson, 6 Upp. Can. Q. B. (N. S.) 360.

30 Southern Exp. Co. v. Newby, 36 Ga. 635.

31 Grosvenor v. New York Central R. R., 39 N. Y. 34, LEADING ILLUSTRATIVE CASES.

32 Merritt v. Old Colony & N. Ry. Co., 11 Allen 80 (Mass.).

33 The R. G. Winslow, 4 Biss. 13 (U. S. Cir. Ct.).

actual transportation has begun. If there has been consent manifested to receive one as passenger, whether this be express or implied, it is enough. Thus if a person who intends to be carried has boarded a vehicle which has been put at his disposal, he has become a passenger, though the vehicle has not yet started.[34] And one who is in the waiting room of a station ready to board the cars has been held already to be entitled to all the rights of a passenger.[35] It was early held that when a man, intending to take passage in a vehicle which has stopped to receive him, puts his foot upon the step or his hand upon a hand rail, he has been accepted as a passenger, and the responsibility of the carrier toward him as a passenger has begun.[36] In accordance with this reasoning, it has been held in most cases relating to street cars that the relation of carrier and passenger is established the moment the vehicle slackens its speed in response to signal.[37]

45. **Basis of the undertaking.**—Where the customer is dealing with an employee, it is sometimes difficult to say whether the servant is undertaking public service on behalf of his master, or whether he is agreeing to a private service in his personal capacity. Where a parcel was given to the coachman who undertook to deliver it in town, it was held that such carriage was a private matter, undertaken by the servant personally.[38] A person leaving

[34] Massiter v. Cooper, 4 Esp. 260 (Eng.).
[35] Norfolk & W. R. R. Co. v. Galliher, 89 Va. 639, 16 S. E. 935.
[36] Brien v. Bennett, 8 C. & P. 724 (Eng.), LEADING ILLUSTRATIVE CASES.
[37] St. Louis I. M. & S. Ry Co. v. Lawrence, 153 S. W. 799 (Ark.).
[38] Butler v. Basing, 2 C. & P. 613 (Eng.).

a package upon the front platform of a street car should not expect the company to be liable, unless there has been a holding out to take for an additional price miscellaneous parcels which passengers bring with them.[39] When the telegraph operator writes out the message as a favor to the sender, he is acting plainly for him, not for the company.[40] One who is received as a guest upon the invitation of the servant of the proprietor certainly should understand that he does not fall within the profession of that master. Thus one riding in the carrier's vehicle, not as ordinary passengers ride, but upon invitation of the carrier's servant without paying fare, should never be held to be a passenger, his relations being with the servant, not with the carrier.[41]

46. **Whether relationship is established.**—To be received at an inn as a guest one must make himself known to the innkeeper, and request entertainment.[42] Moreover, he must be accepted by the innkeeper, or be given cause to understand that he has been.[43] A passenger must put himself in the care of the carrier, and there must be something from which it may fairly be implied that the company has accepted him as a passenger. So a traveler who is concealing himself with the intention of stealing a ride, clearly is not a passenger.[44] One who

[39] Levi v. Lynn & B. Ry. Co., 11 Allen 300 (Mass.).

[40] Pegram v. Western Union Telegraph Co., 100 N. C. 28, 6 S. E. 770.

[41] Toledo W. & W. Ry. Co. v. Brooks, 81 Ill. 245, LEADING ILLUSTRATIVE CASES.

[42] Bernard v. Lalond, 8 Leg. News 215 (Can.).

[43] Brewer v. Caswell, 132 Ga. 563, 64 S. E. 674.

[44] Muehlhausen v. St. Louis R. R., 91 Mo. 332, 2 S. W. 315.

obtains service by fraudulent representations in obtaining his ticket cannot claim the rights of a passenger.[45] And one who makes a deal with a conductor to let him travel for a gratuity paid must know that he is entering into no relations with the company.[46] Nor can one who conceals the true nature of goods shipped in order to get a lower rate charge the carrier with their loss.[47] The fundamental principle in all of these cases is that there is no assent by the company to enter into the relationship. Or if there is apparent consent, it is obtained by the fraud used to gain it.

47. **Service under unusual conditions.**—A railroad is not a common carrier of a person who by permission of the engineer rides on a locomotive.[48] And so a passenger who, without the knowledge or consent of the conductor of the train, rides in the baggage car, cannot maintain an action against the railroad company for injuries sustained which would not have happened to him had he been in a passenger car.[49] So clearly, one riding upon a construction train of flat cars before general service is begun must appreciate that he is not being accepted as a passenger by the company.[50] Yet the possibility remains that one may be accepted upon a freight train as a passenger, if the circumstances are such as give him to understand that this is a regular

[45] Mendenhall v. Atchison T. & S. F. Ry. Co., 66 Kans. 438, 71 Pac. 846.
[46] Grahn v. International & G. N. R. R. Co., 100 Tex. 27, 93 S. W. 104.
[47] Oppenheimer & Co. v. United States Express Co., 69 Ill. 62.
[48] Ramm v. Minneapolis & St. L. R. R., 94 Iowa 296, 62 N. W. 751.
[49] Bricker v. Philadelphia & R. R. R., 132 Pa. St. 1, 18 Atl. 983.
[50] Wade v. Lutcher & Moore Cypress Lumber Co., 74 Fed. 517.

course of business.[51] But if no such custom of taking passengers on freight trains prevails, one could hardly reasonably consider himself accepted by the company as a passenger, whatever his dealing with the conductor may be.[52] And the circumstances could hardly arise under which one might think of himself as a regular passenger while riding on a hand car.[53]

48. **Special arrangements for particular service.**—If the owner of goods goes along with them and retains possession of them, the person who furnishes the vehicle is not a carrier since he is not a bailee. In the case of a ferry, for example, the fact that the owner goes along with the goods and often retains the entire charge and management of them (as for instance where he drives a horse on the ferryboat and manages him while on the boat), prevents the relation of carriage.[54] But though the owner of cattle or his servant may accompany the cattle, as a driver, while they are being carried, and may care for them and help unload them, the railroad company is none the less the bailee and carrier of the cattle, as he must do all this while the cattle are in the possession of the railroad company and at such times as it chooses to select for the purpose.[55] The case of the circus train is peculiar in that the keeping of the wild beasts obviously re-

[51] Illinois Central R. R. v. Davenport, 177 Ill. 110, 52 N. E. 266.

[52] Eaton v. Delaware L. & W. R. R. Co., 57 N. Y. 382, LEADING ILLUSTRATIVE CASES.

[53] Cleveland v. Pine Bluff Arkansas Ry., 154 S. W. 191 (Ark.).

[54] White v. Winnisimmet Co., 7 Cush. 155 (Mass.).

[55] Southern Ry. Co. v. Webb, 143 Ala. 304, 39 So. 262.

mains with the owners of the circus who make a special contract for the haulage of their train.[56] In much the same way, when vessels are towed the towboat owner is rarely held to take possession from the shipowners.[57]

[56] Coup v. Wabash, St. L. & P. Ry. Co., 56 Mich. 111, LEADING ILLUSTRATIVE CASES.

[57] Alexander v. Greene, 3 Hill 9 (N. Y.).

CHAPTER VI.

REGULATION OF THE EMPLOYMENT.

49. **The place of regulations.**—Public businesses are usually carried on upon a large scale, and for their proper conduct it is plainly requisite to have established regulations. Great scope is allowed to regulations by the law, large discretion being given to those who are confronted with the problem of reducing to order a complicated business. However, it is the law, here as elsewhere, which has the last word to say concerning the propriety of the regulation in question. What the courts generally do is to hold justifiable a regulation which is made by a company in good faith and enforced by it without discrimination, unless it is plainly outrageous in its general operation. If the court might have itself done differently, or even if it sees hardship in particular cases, neither of these things is enough, as will be seen, to induce it to set the regulation aside, or hold it no justification for what was done in pursuance of it. Without regulations, a company may refuse to accede to particular requests, but it must then show that the particular request is unreasonable. But with a general regulation, a service may be refused to anyone, notwithstanding his particular hardship, unless the whole rule is shown to be unreasonable or inconsistent with the duty which the company owes to the public.

50. **Scope of regulations limited.**—Regulations which are in promotion of public service are valid, while regulations which are inconsistent with public duty are void. One branch of this rule was expounded in one of the earliest American cases in dealing with the somewhat complicated regulations of a canal company as to the order of passage of boats at docks.[58] "The defendants, as owners, had the right to prescribe such reasonable rules and regulations for the government of vessels passing along their canal, as their directors deemed best calculated to promote their own interest and the interests of those engaged in navigating the canal." But this is subject to the qualifications stated in another early case, holding that negroes could be assigned to separate quarters although not excluded from the conveyance.[59] "The right to be carried is a right superior to the rules and regulations of the boat, and cannot be affected by them." It must be remembered that under our system of private ownership questions of management must be solved in the first instance by the owners themselves. We should not let regulation by the state become virtually operation.

51. **Proper establishment of regulations.**—Generally speaking, regulations are not binding unless there has been due notification of them. This does not mean that in every individual case they must have been brought home to the person who is held to be governed by them; it simply means there must

[58] Pennsylvania Coal Co. v. Delaware & H. Canal Co., 31 N. Y. 91.
[59] Day v. Owen, 5 Mich. 520.

be such publication of them as should fairly affect the patrons concerned with knowledge of them.[60] Publication may be by notices posted upon the premises, by provisions printed upon tickets, by advertisements or handbills or in any other way that promises sufficient publicity.[61] When regulations are changed there must be due notice, the same rules applying as in the publication of the original regulations.[62] Even a provision in the original regulation that there may be change without notice, should be unavailing.[63] Waiver of regulations to be effectual must be made by an official having at least apparent authority in the premises. A conductor could not bind the company by promising to stop a train in defiance of a published time-table.[64] Implied waiver comes about by acquiescence in their constant violation by officers charged with the enforcement of rules. Thus when a street railway habitually permits passengers to ride upon platforms, although it has a rule to the contrary, its regulation is held to have been waived.[65]

52. **Reasonable enforcement of regulations.**—The power to make regulations carries with it the power to enforce them. The carrier may expel those who refuse to conform to its reasonable regulations.[66] But such ejection must be accomplished at a proper time and place, and in a proper method

[60] Knoxville Traction Co. v. Wilkerson, 117 Tenn. 482, 99 S. W. 992.
[61] Van Dusan v. Grand Trunk Ry. Co., 97 Mich. 439, 56 N. W. 848.
[62] Sears v. Eastern R. R. Co., 14 Allen 433 (Mass.).
[63] Geer v. Michigan Central Ry. Co., 142 Mich. 511, 106 N. W. 72.
[64] White v. Evansville & T. H. R. R., 133 Ind. 480, 33 N. E. 273.
[65] United Ry. & El. Co. v. Hertel, 97 Md. 382, 55 Atl. 428.
[66] Decker v. Atchison T. & S. F. Ry. Co., 3 Okla. 553. 41 Pac. 610.

and manner.[67] However, this power to enforce regulations does not go to the extent of permitting the company arbitrarily to impose a pecuniary penalty for breaking the rules.[68] Nor can the company hold a passenger until the fare is forthcoming, without being liable for false imprisonment.[69] Similar principles justify a supplying company or a service in cutting off service for default or disobedience of reasonable rules. And like limitations upon this power are to be found if it is exercised with outrageous disregard of the rights of the patron, as in the case where the claim is in dispute or where there has been failure to give notice.

53. **Conditions upon acceptance.**—Regulations relating to the conditions under which service will be undertaken are to be tested by the general conditions pertaining to the service. Thus a railroad may refuse to take goods or passengers unless they are tendered or present themselves within a reasonable time before the scheduled departure of its trains.[70] And so freight or passengers may be refused if the tender is not made or the demand is not made at its regular stations.[71] Moreover, the railroad may by reasonable regulations require that certain freight shall be tendered to it at a particular place or in a certain manner.[72] So an express company may require that valuables

[67] Hudson v. Lynn & B. Ry. Co., 178 Mass. 64, 59 N. E. 647.

[68] American Water Works Co. v. State, 46 Neb. 194, 64 N. W. 711.

[69] Lynch v. Metropolitan El. Ry. Co., 90 N. Y. 77.

[70] Frazier & Cooper v. Kansas City, St. J. & C. B. Ry. Co., 48 Iowa 571, LEADING ILLUSTRATIVE CASES.

[71] Nashville St. Ry. Co. v. Griffin, 104 Tenn. 81, 57 S. W. 153.

[72] Robinson v. Baltimore & O. R. R. Co., 129 Fed. 753.

shall be sealed in certain ways at the time of delivery to the carrier.[73] But if goods are actually taken, notwithstanding the fact that they could have been refused because not tendered in accordance with the regulation, the carrier becomes fully responsible for them as for any other goods which have been taken in charge.

54. **Times established for service.**—Time-tables are to be justified thus, and transportation need only be given according to an established schedule. A time-table which provides a service sufficiently frequent to handle the whole business offered, is a justification for not giving individual attention to particular cases.[74] Time-tables should be established with due regard to the real needs of the community, more frequent service being demanded where there is much travel than where there is little. Moreover, train movements should be so arranged as to take care of the business properly. A railroad is not absolutely responsible for adherence to schedule; it is excused if its failure is due to causes for which it is not to blame.[75] In many public businesses there are premises maintained for the use of the public in the course of the service, or offices established for the convenience of the public dealing with the company. A railroad may certainly by proper regulation close its stations for certain periods; it is usually enough if they are opened a reasonable time before and after the departure of

[73] St. John v. Southern Express Co., 1 Woods 612 (U. S.): See also Platt v. Lecocq, 158 Fed. 723, LEADING ILLUSTRATIVE CASES.

[74] Riley v. Wrightsville & T. R. R. Co., 133 Ga. 413, 65 S. E. 890.

[75] Gordon v. Manchester & L. Ry. Co., 52 N. H. 596.

trains.[76] But if a telegraph office is actually open, although it is after usual closing time, a message must be received. The case is not different from that of a train behind its schedule and stopping at a station. In both cases service must be rendered.[77]

55. **Limitations upon supplying services.**—Likewise supplying companies may make regulations to prevent abuse of the supply by waste, or by fraud upon them by diverting the supply.[78] But a regulation providing that the agents of the gas company should have free access to the premises at all hours for examining appliances was held to be outrageous.[79] It has been held that the supply of a customer might be cut off for letting the water run, although he offered to prove that it was necessary to do this in order to get the water fresh.[80] So a regulation was held justified which provided that, during the sprinkling season, all outside hydrants of a water taker which were a part of his piping system must have the threads filed from them, if he would not pay for sprinkling service.[81] A telephone company may properly object to any tampering by its patrons with the instruments they provide, as that would tend to defeat the service.[82] But regulations unconditionally forbidding gas users to have gov-

[76] Phillips v. Southern Ry. Co., 124 N. C. 123, 32 S. E. 388, LEADING ILLUSTRATIVE CASES.

[77] Bright v. Western Union Telegraph Co., 132 N. C. 317, 43 S. E. 841.

[78] Ferguson v. Metropolitan Gaslight Co., 37 How. Pr. 189 (N. Y.).

[79] Shepard v. Milwaukee Gaslight Co., 6 Wis. 539.

[80] Watauga Water Co. v. Wolfe, 99 Tenn. 429, 41 S. W. 1060.

[81] Harbison v. Knoxville Water Co., 53 S. W. 993 (Tenn.), LEADING ILLUSTRATIVE CASES.

[82] Gardner v. Providence Telephone Co., 23 R. I. 312, 50 Atl. 1014, LEADING ILLUSTRATIVE CASES.

ernors incorporated in their own piping system have been held to be unreasonable.[83]

56. **Regulations relating to prepayment.**—Among the first regulations with which a patron is met are those which are designed to secure prepayment. Thus a street car company may require that a passenger shall deposit his fare in cash in a box upon entering the car.[84] Indeed, the regulations may go further, as they do upon some elevated railways, and require that the passengers first procure a ticket to present at the gate.[85] One of the most illuminating illustrations of the operation of a regulation in changing the situation between the company and its patron is that while a street car company must apparently accept a five dollar bill tendered for its small fare,[86] yet a regulation that no larger bill than two dollars will be changed is held reasonable.[87] In the supply services the company may require a deposit as security if the amount of the deposit required is not far from what a current bill would be.[88] And of the validity of a rule that telephone subscribers must pay before a certain day after bills have been rendered, on pain of having their services cut off, there can be no doubt.[89]

57. **Systems to prevent escaping payment.**—In order to make sure that none are obtaining service

[83] Consolidated Gas. Co. v. Blondell, 89 Md. 732, 43 Atl. 817.

[84] Nye v. Marysville & Y. C. St. Ry. Co., 97 Cal. 461, 32 Pac. 530.

[85] Corwin v. Long Is. Ry. Co., 2 N. Y. City Ct. 106.

[86] Barrett v. Market St. Ry., 81 Cal. 296.

[87] Funderburg v. Augusta & A. Ry. Co., 81 S. C. 141, 61 S. E. 1075, LEADING ILLUSTRATIVE CASES.

[88] Williams v. Mutual Gas Co., 52 Mich. 499, 18 N. W. 236.

[89] Irvin v. Rustville Co-operative Telephone Co., 161 Ind. 524, 69 N. E. 258.

without payment, elaborate regulations are devised, concerning which there has been much litigation. Thus a railroad may require that passengers shall show their tickets before passing the gates leading to the trains,[90] and that these tickets shall be produced upon request of the conductor taking up fares.[91] Similarly street car companies may require that a proper transfer be presented upon changing cars[92] and that transfers shall be good only at intersecting points.[93] If a person has bought a ticket, and even after having once presented it loses it, he may be expelled from the train when the time comes for showing his ticket again.[94] The passenger is, however, entitled to a reasonable opportunity to search for his ticket.[95] The real justification for these elaborate regulations is that they are well designed to enforce the ticket system, without which orderly management would be impossible.

58. **Excess charge for cash fare.**—As the railroad company may require tickets absolutely, if it permits cash to be paid on the train in the alternative by those who have not procured tickets in advance, an extra charge may be made those who have not procured tickets.[96] Certainly the usual system of requiring a larger cash payment to the conductor accompanied with a refund check for the excess is

[90] Dickerman v. St. Paul Union Depot Co., 44 Minn. 433, 46 N. W. 907, LEADING ILLUSTRATIVE CASES.

[91] Ammons v. Southern Ry. Co., 138 N. C. 555, 51 S. E. 127.

[92] Birmingham Ry. L. & P. Co. v. McDonough, 153 Ala. 122, 44 So. 960.

[93] Percy v. Metropolitan St. Ry. Co., 58 Mo. App. 78.

[94] Harp v. Southern Ry., 119 Ga. 927, 47 S. E. 206.

[95] Maples v. New York & N. H. R. R. Co., 38 Conn. 557.

[96] Railroad Co. v. Skillman, 39 Oh. St. 444.

permissible.[97] This regulation is not in itself unreasonable or needlessly inconvenient to the traveler, and its validity, upon general principles and on authority, would seem to be beyond question, since only by the ticket system can the company effectively protect itself from fraud of all sorts. A difficult situation, which has often come before the courts, is where the ticket office at the station where the passenger comes to take the train is wrongfully closed by neglect of the station agent. Under such circumstances, the great majority of the cases have held that, as the passenger has had no opportunity to obtain a ticket, he should not be ejected for refusal to pay the extra charge.[98] There are, however, cases to the contrary, holding that when a passenger presents himself without a ticket, the obvious duty of the conductor, so far as he is concerned, is to enforce the regulation requiring the payment of the excess cash fare, unless he knows for a fact that the office was closed.[99]

59. **Effect of agent's mistake.**—Where the ticket agent gives a ticket not good for the transportation asked for, so that when this ticket is presented to the conductor the passenger cannot get the transportation which he expected, the company is in the wrong.[1] But where the intending passenger makes a mistake in asking for a ticket so that the wrong ticket is given him, or his acceptance of the wrong

[97] State v. Goold, 53 Me. 279.

[98] Forsee v. Alabama Gt. So. Ry. Co., 63 Miss. 66, LEADING ILLUSTRATIVE CASES.

[99] Monnier v. New York C. & H. R. R. R. Co., 175 N. Y. 281, 67 N. E. 569.

[1] Jevons v. Union Pacific R. R. Co., 70 Kans. 491, 78 Pac. 817.

ticket is palpably negligent, he is foreclosed.[2] The abstract question whether the company or the passenger is in the wrong is usually decided properly without any noteworthy conflict of authority; but there is an irreconcilable division in the authorities as to the consequences of the company's being in the wrong. There are many states[3] where it is held that if the company is in the wrong, the passenger may resist expulsion and recover damages for personal injuries caused thereby. But in fully as many other states[4] it is held that although the ticket agent was in the wrong, so that the company may be sued for his default, the passenger has in fact gained no right to travel, and the conductor commits no wrong by ejecting him. The writer favors this latter view, because he believes in the inherent necessity of the ticket system. With this policy it is reasonable to enforce in this case, as in all others, the regulation that only those may expect to be passed by the conductor who present a good ticket. The company, however, remains liable for the original wrong done the passenger, when the ticket agent failed to pass out the proper ticket.

60. **Mistakes of the conductors.**—Where the first of two conductors wrongfully punches the ticket or collects the ticket without giving a check, so that the conductor upon another train either refuses return passage or further transportation, the same situation again arises, and the same conflict of author-

[2] Rudy v. Rio Grande Western Ry. Co., 8 Utah 165, 30 Pac. 366.

[3] Mace v. Southern Ry. Co., 151 N. C. 404, 66 S. E. 342.

[4] Bradshaw v. So. Boston R. Co., 135 Mass. 407, LEADING ILLUSTRATIVE CASES.

ity results. Some cases[5] hold that the second conductor expels such a passenger at his peril, on the ground that the ticket which he is presenting is the one which the previous conductor has assured him would be all right. Others hold,[6] however, that the second conductor may eject the passenger, as he has not a proper ticket, and the passenger must seek his redress from the company for the wrong done him by the first conductor. It should be said that if the whole mistake is made by the conductor himself, the expulsion will be wrongful. Thus where a conductor collects a ticket and afterwards wrongfully expels a passenger, the conductor is responsible for the injury caused thereby.[7] And where the passenger actually has a good ticket which the conductor—however honestly mistaken—refuses to honor, it would seem clear that the passenger may resist expulsion.[8]

[5] Philadelphia W. & B. R. R. Co. v. Rice, 64 Md. 63, 21 Atl. 97, LEADING ILLUSTRATIVE CASES.

[6] Townsend v. New York C. & H. R. R. R. Co., 56 N. Y. 295.

[7] Arnold v. Rhode Island Co., 28 R. I. 118, 66 Atl. 60.

[8] Northern Central R. R. Co. v. O'Connor, 76 Md. 207, 24 Atl. 449.

CHAPTER VII.

COURSE OF THE UNDERTAKING.

61. **Conduct of the undertaking.**—In the first place those who have undertaken a public service have always been strictly held to use every effort practicable to carry it through as promptly as may be. The duty is performed if all that could be asked of the proprietors has been done. There are, therefore, many unexpected obstacles which will excuse delay in performing services. But even if the delay is excused, the duty remains to complete performance, if that can be done. Indeed, quite extraordinary steps are often required by the law for the protection of the patron at all times. This duty to take affirmative steps to protect the interests confided to them is one of the obligations which differentiates public service from private employment. And, as will be seen, one extraordinary result of this affirmative obligation to furnish protection is that the proprietors are held absolutely liable for any attack which their own servants may make upon those in their charge. Moreover, by the general rule public servants are held strictly accountable for any departure from the service undertaken. What they have assumed to do for their patrons they must do in the very way that they have undertaken to do it. If they fail to perform in the way they have undertaken they are held absolutely liable for what hap-

ens. However, if extraordinary events occur after erformance has been begun any necessary departure rom the designated course will be excused. But, n the other hand, every effort must be made to minimize the loss involved.

62. **Delay in performing service.**—Sometimes he delay is so obvious as to speak for itself. Thus he consumption unexplained of thirty days in the arriage of goods usually taking but three days is ertainly clearly negligent.[9] But the carrier does not insure against delay in the delivery of goods. If he uses all reasonable effort to get them through hat is all the law requires.[10] What is reasonable ime for performing transportation depends upon he mode of conveyance, the distance to be traversed, the nature of the goods, the season of the year, and the facilities available for transportation. The requirement of reasonable dispatch in forwarding goods does not necessarily require performance at the earliest possible moment, not by the next train certainly, nor even necessarily on the same day.[11] Even in the case of a telegram its delivery in its regular order and within an hour from the time it was received at the office in the city of delivery has been held to be with reasonable dispatch.[12]

63. **Loss concurrent with delay.**—Even if the delay is one for which the carrier is clearly to blame, it does not necessarily follow that there is liability for every loss in connection with it. Of course, the

[9] Illinois Central Ry. Co. v. Cobb, C. & Co., 64 Ill. 128.
[10] Delaney v. United States Express Co., 74 S. E. 512 (W. Va.).
[11] Pennsylvania Co. v. Clark, 2 Ind. App. 146, 27 N. E. 586.
[12] Julian v. Western Union Telegraph Co., 98 Ind. 327.

liability is plain when the loss is directly the result of the delay, as in that case[13] where a carter, delayed in his journey, left his wagon in mid-river at a ford and the goods, as he might have foreseen, were injured by a freshet. And where the carrier transported potatoes unduly slowly in winter, the exposure to the risk of freezing in a subsequent period of severe cold was properly held to be so materially increased by the extension of the usual period of transit as to make the carrier liable.[14] There is, however, a noteworthy conflict of authority upon the question whether a carrier who delivers goods to an intermediate point late should be held responsible for the destruction of the goods there by an act of God. Many hold that the negligent delay of the carrier in transportation should not be regarded as the real cause of the loss of goods by flood, even admitting that had the goods been transported with reasonable diligence they would not have been involved in the casualty.[15] But the many cases must be reckoned with which hold that liability is made out from the mere fact that the loss would not have happened but for the negligent delay, some judges going so far as to say that if a carrier unjustifiably late is passing a powder magazine just as it is struck by lightning, the owner of the goods may sue for their destruction.[16]

[13] Campbell v. Morse, Harper 468 (N. C.).

[14] Fox v. Boston & M. R. R. Co., 148 Mass. 220, 19 N. E. 222, LEADING ILLUSTRATIVE CASES.

[15] Denny v. New York Central R. R., 13 Gray 481 (Mass.).

[16] Green-Wheeler Shoe Co. v. Chicago R. I. & P. Ry. Co., 130 Iowa 123, 106 N. W. 498, LEADING ILLUSTRATIVE CASES.

64. **Deviation from the undertaking.**—The undertaking of a common carrier, in the absence of any special contract, is to transport the property to the place of destination by the most usual, safe, direct and expeditious route. In accordance with this very general principle it has been held a deviation for a carrier, in violation of its undertaking, to ship goods before the time agreed upon[17] or on a different vessel from that stipulated for.[18] So it is deviation to ship by rail instead of by water,[19] or by water instead of by rail.[20] It may be a deviation to forward by steamship instead of sailing vessel,[21] and it is a deviation to transship goods.[22] But it would probably be going too far to call it a deviation to carry the goods in a position different from the directions given, or to hold them for too long a time. But generally speaking any material departure in the conduct of carriage from the special undertaking in regard to it constitutes a deviation, as any course which differs materially from the performance which was understood to have been undertaken is a deviation.

65. **Absolute liability during deviation.**—Proof of a deviation and loss concurrent with it, from whatever cause arising, makes out a case of liability without more.[23] By the general theory this liability

17 Campion v. Canadian Pacific Ry. Co., 43 Fed. 775.
18 Green & B. R. Nav. Co. v. Marshall, 48 Ind. 596.
19 Merrick v. Webster, 3 Mich. 268.
20 Philadelphia & R. R. Co. v. Beck, 125 Pa. St. 620, 17 Atl. 505.
21 Simkins v. Norwich & N. L. Steamboat Co., 11 Cush. 102 (Mass.).
22 The Maggie Hammond, 9 Wall. 435 (U. S.).
23 See the language in Davis v. Garrett, 6 Bingham 716 (Eng.), and in Church v. Chicago, M. & St. P. Ry. Co., 6 S. D. 235, 60 N. W. 854.

is not based upon negligence in the conduct of the undertaking, nor do the cases require proof of negligence. The mere fact of deviation is essentially a wrong in itself, as it constitutes a repudiation of the arrangement under which the carrier was authorized to act. The carrier, as the cases go, is unhesitatingly held liable in all cases, even when the act of God or the king's enemies are clearly the real cause of the loss. The explanation of this rule making the carrier who has deviated from its undertaking liable at all events thereafter, is the peculiar liability which the law attaches to improper intermeddling. As this intermeddling makes the whole performance thereafter fundamentally different, this absolute liability should persist until the goods are finally delivered. And very probably this is the law, although some doubts may be entertained after reading the opinions in many leading cases.[24]

66. **Negligence in not avoiding.**—Even where the damage is apparently caused exclusively by some overwhelming calamity, nevertheless if the public servant could have foreseen the catastrophe in time to have prevented it,[25] or could have avoided the results of it and negligently failed to do so, he will be liable.[26] This is brought out in two well known United States Supreme Court cases. In Express Company v. Kountze Bros.,[27] it was pointed out

[24] Note the decisions in Thorley Ltd. v. Orchis S. S. Co. Ltd., (1907) 1 K. B. 660 (Eng.), and in Atlantic C. L. Ry. Co. v. Hinely Stephens Co., 60 So. 749 (Fla.).

[25] Caldwell v. Southern Express Co., 1 Flipp 85 (U. S.).

[26] Ewart v. Street, 2 Bailey 157 (S. C.).

[27] 8 Wall 342 (U. S.). LEADING ILLUSTRATIVE CASES.

nat, if the carrier chooses the route which would ery probably expose the goods to capture by the nemy, it will be liable for their capture. In Rail- oad Company v. Reeves,[28] it was pointed out that, nless the carrier failed to exercise due care to save he goods from a rising flood, it would not be held able. Where the injury may be repaired wholly or artially at the place of accident, and where such a ourse is peculiarly necessary to prevent further de- erioration, the duty to meet the emergency by do- ng everything possible is obvious. Thus if a cargo as become wet, it should be dried if that is practi- able.[29] So perishable provisions should be iced if he departure of the carrier has been unavoidably elayed.[30]

67. **Proper protection of patrons.**—Of the gen- ral obligations to protect those with whom the pro- rietors of a public service are having business re- ations, there can be no doubt. One of the first re- uirements which the government demands of every nstitution impressed with a public interest, and one vhich is thrown over every citizen as a great and rotective shield, is the duty to act impartially with ll.[31] They are under obligations to extend their acilities to all persons, on equal terms, who are villing to comply with their reasonable regulations, nd to make such compensation as is exacted from thers in like circumstances. From this principle,

[28] 10 Wall. 176 (U. S.).

[29] Notara v. Henderson, L. R. 7 Q. B. 225 (Eng.).

[30] Peck v. Weeks, 34 Conn. 145.

[31] This paragraph is substantially taken from Dunn v. Western Union elegraph Co., 2 Ga. App. 845, 59 S. E. 189, LEADING ILLUSTRATIVE CASES.

universally recognized, springs the corollary that all such persons, natural and artificial, shall afford to such members of the public, as have occasion to transact with them business of the nature they are holding themselves out as being accustomed to do, safe and decent access to the places opened up for the transaction of the business in question. This safety does not mean mere physical safety, nor this decency mere absence of obscenity, but by the employment of the expression safe and decent access, it is intended to connote also the notion of freedom from abuse, humiliation, insult, and other unbecoming and disrespectful treatment.[32]

68. **Liability for injuries by own servants.**—The clearest examples of the affirmative duty to furnish protection are the cases holding the railroad liable for personal assault upon passengers by its employees. The company is responsible for such assaults on passengers while the employees are on duty, although the violence may have no apparent relation to the conduct of the business. Thus in one of the leading cases on this subject, a railroad was held liable for a trainman's kissing of a lady passenger.[33] In the law of private relations when the assault is committed by a servant out of personal spite or in a frolic of his own, many authorities hold that the master is not liable. But practically all the cases as to public employment hold the company liable for its failure to protect its patrons from all as-

[32] If the servant precipitates trouble the company is liable for the consequences. Gooch v. Birmingham Ry. L. & P. Co., 58 So. 196 (Ala.).

[33] Craker v. Chicago & N. W. Ry. Co., 36 Wis. 657, LEADING ILLUSTRATIVE CASES.

faults whatsoever by any employee whatever.[34] This is sometimes spoken of as exceptional; but as a matter of fact the apparently extreme liability of the public company in such cases is part of the general duty to protect those in its charge. Indeed, it may help in understanding the law to say that every servant of the company has the duty to protect patrons from injury by himself as well as injury by third parties.

69. **Protection from third parties.**—Moreover, those engaged in the public services which involve the charge of persons and their belongings are under a stringent liability to use the utmost care in their protection from such injuries from third parties as they ought to have foreseen and could have prevented. This is because there is a special duty to protect patrons from insult by third parties, whoever they may be. Indeed the law is very exacting as to all this, holding the carrier or innkeeper liable for injuries by third parties which ought to have been anticipated. A distinction, it should be noted, is made in these cases which was not made in the preceding paragraph. Wherever, for instance, the trainmen take no steps to protect the hand luggage of a passenger from theft, the company will be held liable.[35] But where a sudden attack is made upon the passenger which the conductor had no reason to anticipate he is not liable if he cannot get to the aid of the passenger in time.[36] A railroad is liable for

[34] Chesapeake & O. Ry. Co. v. Francisco, 149 Ky. 307, 148 S. W. 46.

[35] Hasbrouck v. New York C. & H. R. R. Co., 202 N. Y. 363, 95 N. E. 808.

[36] Putnam v. Broadway & S. A. R. R. Co., 55 N. Y. 108.

assault on a passenger in the waiting room only if the conditions in that locality are such as to require constant guard to be kept.[37] But surely a carrier should not abandon a non-union workingman to a mob which is demanding him, even if this might make it safer for other passengers.[38]

70. **Avoidance of threatened harm.**—In particular there are many cases describing the liability which carriers are under to protect their patrons while in their charge from injuries to them by their fellow passengers which there was reason to anticipate, either from general circumstances or from particular facts. Injury to passengers resulting from overcrowding at stations is danger for which the carrier is bound to answer and could have taken measures to prevent.[39] If so many are taken on board a car that one of the passengers is subsequently crowded off, the carrier is liable, for it should not have permitted the car to get so dangerously overcrowded.[40] Speaking generally, the carrier must use the utmost care in protecting passengers from all evil doers whatsoever, and there are many well considered cases which support this view; but none of them fail to impose the qualification that the wrong or injury done the passenger by such strangers must have been perpetrated under such circumstances that it might reasonably have been

[37] Batton v. So. & No. Ala. R. R. Co., 77 Ala. 591, LEADING ILLUSTRATIVE CASES.

[38] Chicago & A. R. R. v. Pillsbury, 123 Ill. 9.

[39] Pray v. Omaha St. Ry. Co., 44 Neb. 167.

[40] Dittmar v. Brooklyn Heights R. R. Co., 91 App. Div. 378 (N. Y.), 86 N. Y. Supp. 878.

ticipated. Thus a carrier will be liable for in-ry to passengers by a mob only when the facts re known to it in time to have taken effective tion.[41] And the owners of a sleeping car will not held liable for the assassination of a passenger nile the car is standing in the station.[42]

771. **Injuries outside the employment.**—When the ssault committed by the employees is at some her place than the premises of the company, to nich this special duty to protect does not extend, e company may escape liability. Thus where a rson waiting for a car outside the car barn was ssaulted by an employee the company was not held sponsible.[43] But where a conductor hurled a pas-nger from a car and followed this by an attack on him in the street it was all held a continuous ssault for which the company was liable.[44] Upon milar principles the company is not responsible r failing to protect those who have no business lations with it. Thus it owes no affirmative duty furnish protection to sightseers upon its prem-es; nor need it provide protection for passengers ter a reasonable time has passed for them to leave e premises.[45] Still less is it liable for wrong done a former passenger by a trainman away from the remises of the carrier after the transportation is er.[46]

[41] Pounder v. Northeastern R. R., (1892) 1 Q. B. 385 (Eng.).
[42] Connell's Ex'rs. v. Chesapeake & O. R. R. Co., 93 Va. 44, 24 S. E. 467.
[43] Palmer v. Winston-Salem Ry. & Elect. Co., 131 N. C. 250, 42 S. E. 604.
[44] Peeples v. Brunswick & A. R. R. Co., 60 Ga. 281.
[45] Chicago & A. Ry. Co. v. Tracey, 109 Ill. App. 563.
[46] Missouri K. & T. R. R. Co. v. Pope, 149 S. W. 1185 (Tex.).

72. **Peculiar protection under special circumstances.**—In certain callings peculiar care is owed patrons because of the extent to which they intrust themselves to the proprietors. An innkeeper who without warning, allowed a guest to come to a house where there was a contagious disease was held responsible to a guest who contracted that disease.[47] Similarly a sleeping-car company is bound to keep continual watch by night to protect sleeping passengers from harm.[48] Indeed in the case of sleeping cars there is a cumulative liability; the passenger who can show a failure to take every precaution for his safety having the right to sue either the car company or the railroad company. In emergencies it should be added, every ordinary course should be set aside. Where a passenger is stricken with violent illness a train should be stopped at the next place where medical attendance can be obtained.[49] And where peaches are rotting the carrier may take the extraordinary step of selling them on the spot.[50]

[47] Gilbert v. Hoffman, 66 Iowa 205, 23 N. W. 632.
[48] Campbell v. Pullman P. C. Co., 42 Fed. 484.
[49] Central of Ga. Ry. Co. v. Madden, 135 Ga. 205, 69 S. E. 165.
[50] American Express Co. v. Smith, 33 Oh. St. 511.

CHAPTER VIII.

LIABILITY FOR LOSSES.

73. **Proper theory of liability.**—The basis of liability for losses happening in the undertaking is not altogether uniform. What complicates the matter is that the standard of liability for some services differs materially from that of other services. In common carriage and innkeeping our law has for a long time held the proprietors practically liable absolutely as insurers for loss of the goods intrusted to them. To this liability as an insurer, however, there are, as will be seen, at least four well-established exceptions—the act of God, the king's enemies, vice of the goods, and interference of the patron. In all other public callings the most that the law holds the proprietor liable for under any circumstances is the highest practicable standard of care. It should, however, be emphasized that the liability as an insurer imposed upon the carrier and the innkeeper is as abnormal in public service as it is in private business. It is imposed only upon carriers of goods, not upon carriers of passengers; it applies to the protection of the guest's belongings, not of his person. It is not applied to any other public callings, however similar they may be to carriage and innkeeping; and it is only imposed when the service in question is being rendered upon a basis that such service is of a public nature.

74. **Liability as an insurer.**—As to the carrier of goods there is a tradition that its extreme responsibility as a virtual insurer by law is a result of its vocation, which gives it peculiar opportunities for appropriating the property of the shipper. As a matter of fact, there was no case holding the carrier responsible as an insurer until the time of Lord Mansfield.[51] But as the law has been since that time a carrier is thus liable as an insurer, whether or not the loss or injury is its fault, or whether or not it contributes in any way to the loss. The most striking cases of this sort in modern times were those holding carriers liable for the damage done to goods in their charge by such fires as the Chicago fire, where not the slightest negligence could be imputed to them in any respect.[52] In England[53] today the innkeeper is held liable for all loss, except that caused by the act of God, or the king's enemies. In America[54] perhaps a majority of the states hold the innkeeper liable to the same extent as a common carrier; but there are many jurisdictions which hold him liable only for failing to guard the goods of guests.

75. **No insurance for personal injuries.**—Strange as it may seem, this law that holds the common carrier of goods as an insurer of them does not extend to public carriers of passengers, such carriers being held liable only for negligence. Until the middle of the nineteenth century this whole matter was in doubt both in this country and abroad. Carriage

[51] Forward v. Pittard, 1 T. R. 27 (Eng.), LEADING ILLUSTRATIVE CASES.
[52] Merchants' Despatch Co. v. Smith, 76 Ill. 542.
[53] Richmond v Smith, 8 B. & C. 9 (Eng.).
[54] Mason v. Thompson, 9 Pick. 280 (Mass.).

of passengers is comparatively recent, and in the first cases there was a disposition to hold the proprietor of the coach to warrant its roadworthiness.[55] Soon after the introduction of the railroad it was established by the courts that there was a difference, founded upon substantial reasons, between the liability of the common carrier of goods and the common carrier of passengers.[56] The former was held to warrant the safe carriage of the goods, except against loss or damage from the act of God or the public enemy; but the latter was held to contract only for due and proper care in the carriage of passengers.[57] The same applies to innkeeping; the innkeeper is at most responsible for proper care in the protection of his guest; whereas he is liable as an insurer of the belongings of the guest within his inn.[58]

76. **Only compensated service insured.**—It has always been law that free service is not common carriage within the rule holding carriers as insurers.[59] But many services, loosely spoken of as free, may be seen not to be gratuitous upon an examination of all the facts. Thus, where in the case of grain shipments the bags are returned without further charges it is properly held that there is sufficient considera-

[55] Compare Bremner v. Williams, 1 C. & P. 414 (Eng.), LEADING ILLUSTRATIVE CASES, and Ingalls v. Bills, 9 Met. 1 (Mass.).

[56] See Readhead v. Midland Ry. Co., L. R. 4 Q. B. 379 (Eng.), and Thayer v. Old Colony St. Ry. Co., 101 N. E. 368 (Mass.).

[57] Boyce v. Anderson, 2 Pet. 150 (U. S.), (not an insurer of slaves), LEADING ILLUSTRATIVE CASES.

[58] Sandys v. Florence, 47 L. J. C. P. 598 (Eng.), (not an insurer of guests).

[59] Fay v. The New World, 1 Cal. 348.

tion for the whole transaction to make the carrier liable as an insurer when bringing them back.[60] So, in the case of shipments C. O. D., it is properly held that the carrier is liable strictly as such in bringing back the funds collected.[61] Where the service is in reality gratuitous, however, the carrier is liable only for wanton injury or gross negligence.[62] Not being in the least engaged in public employment in gratuitous service the carrier is not bound therein to the utmost care, or even due care.

77. **Carriage of baggage compensated.**—The carrier from time immemorial has taken the necessary luggage of the passenger along with him without additional charge. The carriage of this proper baggage is included, according to the general understanding, in the price paid by the passenger for his transportation. But baggage strictly includes only those things necessary for the convenience of the traveler during his journey. The carrier is liable for the traveling paraphernalia of the passenger, such as clothing and toilet articles.[63] But it is not liable for any merchandise which he may be taking along with him in his trunks, such as cloths and bric-a-brac.[64] Moreover, as baggage is theoretically for use during the journey, it must go with the carrier.[65] If, therefore, it is sent otherwise than along with the passenger, the carrier is not responsible.[66]

[60] Pierce v. Milwaukee & St. P. R. R. Co., 23 Wis. 387.
[61] The Emma, Fed Cas. No. 18218.
[62] Perkins v. Wright, 37 Ind. 27.
[63] New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24.
[64] Michigan Central R. R. Co. v. Carrow, 73 Ill. 348.
[65] Beers v. Boston & A. R. R. Co., 67 Conn. 417, 34 Atl. 541.
[66] Wilson v. Grand Trunk R. R. Co., 56 Me. 60.

But, if the carrier forwards it by another conveyance for its own convenience, the case is different.

78. **Abnormal liability rigidly confined.**—It is significant that the carrier's liability as an insurer is not extended to other employments, however analogous, even when conducted upon a public basis. Bridge proprietors[67] are differentiated from carriers, because they do not take possession; and wharfingers[68] are held not to be carriers, because they do not transport. Telegraph companies have been called carriers, and irrigation companies conveyors; but never have the courts acted upon this language to the extent of holding them liable as insurers. The treatment of employments analogous to innkeeping, has been similar. A restaurant, as has been seen, is not considered an inn, because only food can be had there; and a lodging house is not an inn, because one may only sleep there. Although a steamboat[69] with rooms and meals is much like an inn, and a sleeping-car[70] with a buffet differs but little, the cases are almost unanimous in holding that there is no insurance liability in connection with these services.

79. **Extent of normal liability.**—Illustrations of the true extent of liability in public employment according to modern notions, may be drawn from the other public callings indiscriminately. These are all businesses of the highest importance, requiring a proportionate degree of care in their conduct. To

[67] Kentucky & I. Bridge Co. v. Louisville & N. Ry. Co., 37 Fed. 567.
[68] Chattock & Co. v. Bellamy & Co., 64 L. J. Q. B. 250 (Eng.).
[69] Clark v. Burns, 118 Mass. 275.
[70] Dings v. Pullman Co., 154 S. W. 446 (Mo. App.).

require an extraordinary degree of care and skill in the business of sending messages by telegraph[71] well exemplifies the general rule of care proportioned to the service undertaken. This requires special skill as well as unusual care; if the work is peculiarly difficult, greater skill is required. Similar rules are laid down for the provision of proper service by telephone companies. They must maintain the plant according to the highest standard of the art.[72] In the case of water supply[73] the companies are not held to guarantee the purity of the water furnished; and, indeed, nothing like absolute purity is to be expected when the supply must be taken from the turbid streams of the locality.[74] But the company will be held liable for supplying polluted water, where their negligence in not safeguarding their water supply is shown.

80. **Public businesses requiring peculiar care.**— In regard to the liability of gas companies to their patrons in course of supplying them, the cases from the outset have held the companies to that high degree of care which the peculiar circumstances of this service demands.[75] They deal in, and furnish to, their patrons a dangerous, deadly, explosive, and inflammable element; and they are, therefore, held to the highest degree of care and caution, including a continuing duty of oversight and inspection. It is

[71] Leonard v. New York A. & B. E. M. Telegraph Co., 41 N. Y. 544, LEADING ILLUSTRATIVE CASES.

[72] McLeod v. Pacific Telephone Co., 52 Ore. 22, 94 Pac. 568.

[73] Green v. Ashland Water Co., 101 Wis. 258, 77 N. W. 722.

[74] Grand Junction Water Co. v. Grand Junction, 14 Colo. App. 424, 60 Pac. 196.

[75] Holly v. Boston Gas Light Co., 8 Gray 123 (Mass.).

equally obvious that there are peculiar dangers to all concerned in the supplying of electricity.[76] If a death-dealing current is permitted to enter a customer's house through a defect in the transformer, which could have been detected, the company is uniformly held liable. It must do everything to avoid such accidents that human care, skill, and vigilance can suggest. What the law requires of those who profess a public employment is the utmost foresight, such as the peculiar importance of these special services imperatively requires.

81. **Act of God as an excuse.**—The act of God, which is a universal excuse, is such an inevitable accident as results immediately from natural causes, and is in no way attributable to human agency. Common examples of what are termed acts of God are tempests, earthquakes, tidal waves, and floods.[77] Loss arising from these causes is not charged to the proprietors of the service. Fire caused by spontaneous combustion or lightning is considered inevitable accident, and so excuses the carrier. Sudden changes in conditions are acts of God, unexpected frosts and extreme heat. Electrical disturbances and atmospheric conditions also may excuse as acts of God. In order to establish the excuse of act of God it must be shown that there was no human agency involved in the catastrophe.[78] If, by failure of the wind, a vessel is driven upon the shore, notwithstanding the

[76] Alexander v. Nanticoke Light Co., 209 Pa. St. 571, 58 Atl. 1068.

[77] Wald v. Pittsburg C. C. & St. L. Ry. Co., 162 Ill. 545—the Johnstown flood held an excuse.

[78] See Gilbert Bros. v. Chicago, R. I. & P. R. R. Co., 136 N. W. 911 (Iowa), for an enumeration of the exceptions.

efforts of its navigators, the loss is by act of God.[79] But if a ship, while being steered in its usual course, runs upon the wreck of another ship, which had been sunk below the surface of the water in mid-channel by a sudden squall, the loss is held to be brought about by act of man.[80]

82. **Damage by public enemies.**—From time immemorial seizure by the king's enemies has been an excuse in public service, even where the general rule is that of absolute liability. As a foundation for the excuse a state of war must exist between the community to which the carrier belongs and the country whose forces have made the seizure. The American cases chiefly relate to the situation at the time of our Civil War. It was finally generally agreed that the Confederate Government was so far de facto as not only to make its forces public enemies to federal carriers,[81] but also to make the federal forces enemies to confederate carriers.[82] Damage caused by mere marauders does not come within the excuse;[83] and if a carrier be robbed by a hundred men, he is none the more excusable. Where the absolute liability as an insurer exists, the fact that the goods are injured or seized by a mob of rioters which the carrier is absolutely unable to resist furnishes no excuse, however unexpected the attack may have been.[84]

[79] Colt v. McMechen, 6 Johns. 160 (N. Y.), LEADING ILLUSTRATIVE CASES.
[80] Merritt v. Earle, 29 N. Y. 115.
[81] Bland v. Adams Express Co., 1 Duv. 232 (Ky.).
[82] Wallace v. Sanders, 50 Ga. 134.
[83] Seligman & Bro. v. Armijo, 1 N. Mex. 459.
[84] Pittsburg C. C. S. & St. L. Ry. Co. v. Chicago, 242 Ill. 178, 89 N. E. 1022.

83. **Vice of the property.**—There is also an established excuse if the loss happens by deterioration or by disintegration of the goods in transit, whether this is due to inherent characteristics or precipitated by external factors. If, for example, the loss happens by a freezing in winter or by rotting in summer,[85] there is this apparent excuse. Likewise a loss caused by the fermentation of the molasses[86] being carried, or by the decay of the fruit in transit, will be excused. In any case, the deterioration of the goods must be the sole result of natural causes. This excuse finds its chief scope in the law relating to the carriage of animals. It is almost universally agreed that this is common carriage with all the law thereto applying; but, since animals are being dealt with, losses which can be traced primarily to their proper vice are held excused.[87] Of course special care must be taken of animals because they are alive; and in emergencies unusual steps must be taken to save them. But if, notwithstanding due care for them, they injure themselves, or die by accident, the carrier may not be held liable.[88]

84. **Interference by the patron.**—Where the patron interferes and takes a hand in the services, there is another exception to the insurance liability. Thus, where the shipper put hay into a stock

[85] Funsten Fruit Co. v. Toledo St. L. & W. Ry. Co., 163 Mo. App. 426, 143 S. W. 839.

[86] Faucher v. Wilson, 68 N. H. 338, 38 Atl. 1002.

[87] Kansas Pacific R. Co. v. Nichols, Kennedy & Co., 9 Kans. 235.

[88] Coupland v. Housatonic R. R. Co., 61 Conn. 531, 23 Atl. 870, LEADING ILLUSTRATIVE CASES.

car, in violation of regulations of the company forbidding the putting of combustibles into a car, it was said that the carrier should not be held liable for a subsequent loss by fire.[89] Similarly, where a servant of the shipper accompanying stock took a lantern into the car, which set the car on fire, it was held that the railroad was not liable, whether the lantern was handled negligently or not.[90] If the shipper assumes the responsibility for securing the goods upon the vehicle, the carrier is then relieved from liability for loss caused thereby.[91] But if the improper loading should have been apparent to the carrier, from the ordinary inspection which it or its servants would naturally give, the carrier will be liable.[92]

[89] Pratt v. Ogdensburg & L. C. R. R. Co., 102 Mass. 557.
[90] Hart v. Chicago & N. W. Ry. Co., 69 Iowa 485, 29 N. W. 597.
[91] Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645, 49 N. E. 215.
[92] Elgin J. & E. Ry. Co. v. Bates Machine Co., 200 Ill. 636, 66 N. E. 326.

CHAPTER IX.

SPECIAL LIMITATION OF LIABILITY.

85. **Limitation upon liability possible.**—It may well be that the abnormal liability of an insurer which the law imposes upon the carrier and the innkeeper may be cut down by special arrangement. Indeed, in discussing the insurance liability in the preceding chapter no good reason was apparent for so onerous an obligation. But it would seem to be against public policy for a public servant to go further and stipulate that he shall not be liable for his negligence in the performance of his undertaking. At all events this distinction is the one which is generally taken by the courts, which allow limitation of liability as an insurer, while declaring void stipulations against liability for negligence. A contract being found, the question becomes one of public policy rather than positive law. The only issue then is whether the contract in question is truly inconsistent with the maintenance of that high standard which public service demands. And it follows that where the service in question is not public in character, or is not being rendered upon a public basis, there is no objection to a special contract reducing liability to the lowest terms. There is no public policy of the sort described involved in private employment of this character.

86. **Special contract must be found.**—According to the early English cases[93] it was possible, by a mere notice to that effect, to relieve one's self from the insurance obligation. But today such notice is held insufficient in itself to make out a special contract, unless it may fairly be said to have been expressly incorporated in an actual contract between the parties. But a special contract, if it has all the requisite elements for a contractual obligation, may in almost all jurisdictions be made, and by its operation the normal common law liability may be limited to a greater or less extent.[94] The company, it would seem however, may not force its patrons to make such special contracts; they should enter into them voluntarily. But, generally speaking, one who has common law rights may bargain them away, unless the contract is against public policy. The acceptance of an instrument commonly used to embody the contract, such as a bill of lading, will usually be conclusive proof of the contract it evidences.[95] The law presumes, in the absence of fraud or imposition, that the patron read it, or was willing to assent to its terms without reading it.[96]

87. **Limitation of liability as insurer.**—Exceptional liability—such as that making the common carrier of goods liable as an insurer—may be done away with by a special contract properly made. By the overwhelming weight of authority, it is conceded that a contract which goes no further than this is

[93] Mayhew v. Eames, 3 B. & C. 601 (Eng.), LEADING ILLUSTRATIVE CASES.
[94] Cau v. Texas & P. R. R. Co., 194 U. S. 427, 24 Sup. Ct. 663.
[95] Railroad Co. v. Manufacturing Co., 16 Wall. 318 (U. S.).
[96] Grace v. Adams, 100 Mass. 505.

t against public policy.[97] And, indeed, a contract nich only relieves from liability a carrier who has ercised the utmost human foresight certainly can- t be said really to tend in any way to impair that ficiency which is requisite in a public service.[98] Ac- rding to modern notions of responsibility, there is ry rarely reason enough to make a party to whom fault can be attributed liable for a loss. Cer- inly there is no argument in favor of such responsi- lity strong enough to declare against public policy contract limiting liability to blameworthy con- ct.[99] If there ever was any reason for making the rrier liable as an insurer, that reason no longer s sufficient force to set aside the contract of the rties. There is reason enough for holding those in blic employment to the highest standard in per- rming that service. But there is no sufficient undation for adding the insurance business to com- on carriage and making them inseparable.[1]

88. **Policy against excepting negligence.**—Public licy demands of common carriers and all others public employment that they shall exercise due re and all possible vigilance. Hence the carrier of ods is forbidden by the cases generally to limit liability for negligence by contract with the ship- r.[2] It may not contract against the consequences its own or its employees' negligence even if the

[97] Railroad Co. v. Lockwood, 17 Wall. 357 (U. S.), LEADING ILLUSTRATIVE SES.

[98] Hoadley v. Northern Transportation Co., 115 Mass. 304.

[99] Davis v. Central Vt. Ry. Co., 66 Vt. 290, 29 Atl. 313.

[1] Boorman v. American Express Co., 21 Wis. 152.

[2] Bank of Ky. v. Adams Exp. Co., 93 U. S. 174.

shipper is willing—and such a contract will not relieve or excuse it from liability.[3] The real reason for this seems to be that if such contracts were permitted they would be universally required; and this would result in an inevitable deterioration in public service.[4] Indeed, that the invalidity of such exemptions is due to the public character of the service is shown by the fact that when the matter under contract does not directly pertain to the public service, as such, the contract is held valid. Jurisdictions are few indeed where a limitation upon liability for negligence in a public service is permitted; and even in those states the contract must be in the plainest language to cover negligence.[5] The argument in favor of permitting such limitations is that parties should be free to contract as they please. But the overwhelming weight of authority against permitting such limitation is proof positive that it is against public policy.

89. **Invalidity of special stipulations.**—A provision in a special contract with a water taker that he would not hold the city liable for its negligence in supplying water, is void.[6] Likewise a contract between an electric lighting company and its patron, stipulating that it should not in any event be liable for damage to person or property arising or resulting from the use of light, is against public policy.[7]

[3] Southern Exp. Co. v. Moon, 29 Miss. 822.

[4] Maslin v. Baltimore & O. R. R. Co., 14 W. Va. 180.

[5] Mynard v. Syracuse B. & N. A. R. R., 71 N. Y. 180, LEADING ILLUSTRATIVE CASES.

[6] Dittmar v. New Braunfels, 20 Tex. Civ. App. 293, 48 S. W. 1114.

[7] Denver Consolidated Electric Co. v. Lawrence, 31 Colo. 301, 73 Pac. 39.

A stipulation by a telephone company that it would not be liable for messages delivered will not protect it against a suit for default if the service in question is shown to be part of its regular course of business.[8] And a gas company is liable for an explosion notwithstanding a stipulation in the original application to the company exempting the company from damages by explosion.[9] A telegraph company cannot stipulate against liability for negligence;[10] but most inconsistently it is generally held that liability for negligence may be excepted in the case of an unrepeated message.[11]

90. **Limitation of amount recoverable.**—Stipulations limiting the recovery to an agreed amount in case of loss by negligence do not, however, necessarily tend to defeat public service, and therefore are not held against public policy by the great majority of cases. It is difficult to see how any considerations of sound public policy require that such contracts should be held invalid. It seems clear that a person, who in such a contract fixes a value upon his goods which he intrusts to the carrier, should be bound by his valuation.[12] Furthermore, where a limitation is made to a set amount fixed by the company in the special contract for shipment at a certain rate, the patron (having the alternative to ask

[8] Central Union Telephone Co. v. Swoveland, 14 Ind. App. 341, 42 N. E. 1035.

[9] Bastian v. Keystone Gas Co., 27 (N. Y.) App. Div. 584, 50 N. Y. Supp. 537.

[10] Ayer v. Western Union Telegraph Co., 79 Me. 493, 10 Atl. 495.

[11] Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, LEADING ILLUSTRATIVE CASES.

[12] Southern Express Co. v. Owens, 146 Ala. 412, 41 So. 752.

service upon a common law basis) is bound by the stipulation even in case of the carrier's negligence.[13] In some jurisdictions, however, these rules are denied, the thoroughgoing doctrine being that it is always contrary to the policy of the law that a public servant should ever be permitted to stipulate for any exemption from liability for defaults for which he is to blame.[14] And indeed it would probably be generally agreed that where the value set is so small as virtually to relieve the company from liability, such a stipulation should be set aside as practically the same thing as a limitation of liability for negligence. But if it is provided that the carrier is always chargeable in a substantial amount for negligence, that may well be enough to keep him sufficiently careful in the conduct of the service.[15]

91. **Other stipulations as to liability.**—In view of these general principles the usual stipulation in the contract of carriage, that notice of loss must be given to the carrier within a time fixed, should obviously be held valid. Such stipulations do not purport to relieve the companies from any part of their obligations as common carriers, for they are bound to the same diligence, fidelity, and care as they would have been required to exercise if such agreement had not been made.[16] It is agreed that such stipulations are not against public policy if a reasonable

[13] Hart v. Pennsylvania R. R., 112 U. S. 331, 5 Sup. Ct. 151, LEADING ILLUSTRATIVE CASES.

[14] Everett v. Norfolk & S. R. R., 138 N. C. 68, 50 S. E. 557.

[15] Missouri K. & T. R. R. v. Harriman Bros., 33 Sup. Ct. 397.

[16] Express Co. v. Caldwell, 21 Wall. 264 (U. S.), LEADING ILLUSTRATIVE CASES.

time—say ninety days or thereabouts—is allowed.[17] But, when one was required to file proof of loss before the time when it would naturally be known, the proviso was held unreasonable.[18] There has been much litigation concerning the validity of the usual stipulation in telegraph blanks requiring the party aggrieved by the fault of the company to file his claim within a relatively short time.[19]

92. **Restrictions applicable to special service.**—The rules which have just been stated apply only to public service, as there is no such public policy otherwise. Thus carriers of passengers may exempt themselves from liability for car employees and train boys.[20] Railroads may stipulate against liability for express matter and circus trains.[21] There need be no liability for cars and their contents upon private sidings before and after transportation,[22] and a carrier may stipulate against liability for losses beyond its own lines.[23] Where private service is being rendered there is no liability for such service which cannot be contracted away, and generally speaking where one performs service beyond his public obligation, he may make such terms concerning it as he pleases, without its being obnoxious to the rules under consideration. The whole matter,

[17] Hatch v. Minneapolis St. P. & S. S. M. Ry. Co., 15 N. D. 491, 107 N. W. 1087.

[18] Wabash R. R. v. Thomas, 222 Ill. 337, 78 N. E. 777.

[19] Wolf v. Western Union Telegraph Co., 62 Pa. St. 83.

[20] Griswold v. New York & N. E. R. R. Co., 53 Conn. 371, 4 Atl. 261.

[21] Coup v. Wabash, St. L. & P. Ry. Co., 56 Mich. 111, 22 N. W. 215, LEADING ILLUSTRATIVE CASES.

[22] Mann v. Pere Marquette Ry. Co., 135 Mich. 210, 97 N. W. 721.

[23] St. John v. Southern Exp. Co., 1 Woods 612 (U. S.).

so far as this chapter is concerned, is dependent upon whether the service in question is public. And it will be remembered, too, that the instances referred to in this paragraph have already been discussed in other connections as not within the law governing public employment.

93. **Liability in gratuitous service.**—Where the service is gratuitous there is no obligation to undertake it upon a public basis. Therefore where service is being rendered without there being any compensation involved in the transaction, the special law of the public service does not apply. But, where a jack was shipped by a steamboat without anything being said about compensation, the court held that in the absence of a special understanding it would be assumed that the carriage was for hire and the carrier liable as an insurer.[24] Although not obliged to perform gratuitous service upon the usual terms, the one who is performing such service may assume the usual obligations which pertain to it. Thus there is no doubt among the authorities that a person carried gratuitously by a railroad is a passenger, and is entitled to the same care as any passenger.[25] It should, however, be plain that a carrier who is carrying a passenger gratuitously does not necessarily owe him the duty owed by a common carrier. Although it is obliged to take care even of a gratuitous passenger, still the obligations of the common carrier do not bind it. The question commonly arises as to the validity of a stipulation against lia-

[24] Knox v. Rives, Battle & Co., 14 Ala. 249.

[25] Quimby v. B. & M. R. R., 150 Mass. 365, LEADING ILLUSTRATIVE CASES.

bility for injury by negligence. Such an exemption is generally held binding, though in the case of a common carrier it would be void.[26] It is now appreciated that the railway company is not truly in such a case acting upon a public basis, although there were once decisions the other way.[27]

94. **Liability to their employees.**—When a railroad is transporting its own employees without charge, there is another distinction to be taken which will make the solution of the problem easier. If the carriage is directly in connection with the work, the relation to the carrier is plainly that of a servant and not that of a passenger, as where a workman on a gravel train is taken from place to place as his services are needed.[28] The decision is the same where employees are being taken to and from their job in work trains.[29] If, however, the employee receives in addition to his regular compensation a pass giving him the right to travel as passenger, then he should be regarded as a passenger, nothing appearing to the contrary.[30] Special tickets given employees to go to their work may, indeed, be regarded as part of the compensation of the employee.[31] The whole question in these cases is whether one is engaged in the service or whether a service is being received.

95. **Persons engaged in dependent service.**—In the majority of cases mail clerks and express mes-

[26] Northern Pacific Ry. Co. v. Adams, 192 U. S. 440, 24 Sup. Ct. 408.
[27] Jacobus v. St. Paul & C. Ry. Co., 20 Minn. 125.
[28] Evansville & R. R. R. Co. v. Barnes, 137 Ind. 306, 36 N. E. 1092.
[29] Ionnone v. New York N. H. & H. R. R. Co., 21 R. I. 452, 44 Atl. 592.
[30] Dickinson v. West End St. Ry., 177 Mass. 365, 59 N. E. 60.
[31] Indiana Traction Co. v. Langley, 98 N. E. 728 (Ind.).

sengers, although traveling in the cars appropriated for the special service, are said to be passengers, for it is pointed out that their transportation is included in the sum paid the railroad by the government.[32] It is, however, generally recognized that as they are necessarily carried in a different car from a passenger coach, to the extent to which it is dangerous to travel in such a car instead of the ordinary passenger car, they take the risk of injury peculiar thereto.[33] On the other hand, it is generally said that, as the carrier is not bound to receive them as passengers, it may make such arrangements as it pleases with regard to terms of carriage and its liability for injury.[34] In other words these persons may be taken upon a public or a private basis, as the facts may show. There are, however, some radical cases deserving of consideration where the fundamental principle in all this is said to be that the carrier cannot make stipulations against liability for injuries to persons being transported in connection with the matters as to which it owes a duty, obliging it to permit persons to travel in the way described as a matter of right.[35]

96. **Real basis of the service.**—The matters discussed in this chapter are well worth serious consideration. The questions involved are two upon analysis; and these are the most fundamental ones in the law governing public service. First: Have we a case of public service in the facts before us?

[32] Cleveland C. C. & St. L. Ry. v. Ketcham, 133 Ind. 346, 33 N. E. 116.
[33] Barker v. Chicago P. & St. L. Ry. Co., 243 Ill. 482, 90 N. E. 1057.
[34] Baltimore & O. S. W. Ry. Co. v. Voight, 176 U. S. 498, 20 Sup. Ct. 385.
[35] Baker v. Boston & M. R. R. Co., 74 N. H. 100, 65 Atl. 386.

It can be shown not to be a case of public service, if the business itself is not in general public in character; or if in particular there has been no undertaking to perform the service in question upon a public basis. Second: Granting that a public service is being rendered, will a special contract relating to the liability during the service be given effect? This special arrangement in turn may fail for one of two reasons: either there is no good contract at all, for lack of initial consent or consideration, or else, if the contract is found, it will be held to be against public policy, as tending to relax those high standards of care in the performance of public service upon which our law is so insistent.

CHAPTER X.

TERMINATION OF THE SERVICE.

97. **When the undertaking is over.**—The obligations imposed by law upon those in public service are conceived of as continuing throughout the service undertaken without interruption from its beginning to its end. Thus the extraordinary liability which makes a carrier practically an insurer continues so long as the public service which it has undertaken is being performed; but after carriage may be said to be over the carrier is simply under the obligation to exercise due care. Here is a case where the extent of the undertaking assumed in the performance of a public service is minutely measured, for the special liability attaches only so long as this public service is being performed. Aside from this particular problem there is the general problem of the proper termination of all liability by completed performance. A carrier may not altogether rid itself of its responsibility for goods which it has carried until it properly parts with possession of them. This is, to a large extent, a question of the full scope of the particular undertaking, which would involve detailed description of the usual course of each particular business, if it were to be treated in detail.

98. **End of the transportation.**—A common carrier, as such, undertakes only transportation to a certain place. When it has deposited the goods at

that point on the route it would seem that it has done all that it has professed; and it seems, therefore, that its exceptional liability as a common carrier should then terminate.[36] From this necessary condition of the railroad business and from the practice of these transportation companies of having platforms on which to place goods from the cars, in the first instance, and warehouse accommodation by which they may be securely stored, the goods of each consignment by themselves, in accessible places ready to be delivered, most courts are of the opinion that the duty assumed by the railroad corporation is that it will carry the goods safely to the place of destination, and there discharge them on the platform and then and there deliver them to the consignee or party entitled to receive them, if he is there ready to take them forthwith, or if the consignee is not there ready to take them, then to place them securely and keep them safely a reasonable time, ready to be delivered when called for.[37]

99. **Reasonable time after notice.**—In a great number of cases the rule is stated to be that the common carrier is an insurer of the goods until the expiration of a reasonable time for the consignee to get them after the transit is completed.[38] If the consignee is present upon the arrival of the goods these cases agree that he must take them without unreasonable delay. But if he is not present these cases argue that the carrier must notify him of the

[36] Mohr & Smith v. Chicago & N. W. R. R. Co., 40 Iowa 579.

[37] Norway Plains Co. v. Boston & M. R. R. Co., 1 Gray 263 (Mass.), from which the paragraph above is virtually quoted.

[38] Bobbink v. Erie R. R., 82 Atl. 877 (N. J.).

arrival of the goods; and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier may place the goods in its freight house; and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases.[39] If, after the arrival of the goods, the consignee has a reasonable opportunity to remove them and does not, he may not hold the carrier as an insurer.

100. **Obligation of personal delivery.**—The service assumed in common carriage does not necessarily go so far as to impose upon the common carrier the obligation of seeking out the consignee, and offering to make delivery to him personally. But personal delivery is professed in certain kinds of carriage, and in such businesses it is therefore owed. If delivery is refused, or the consignee cannot be found, the consignor should be notified, and the goods held for him as a warehouseman, unless the goods are perishable, in which case they may be sold for his account.[40] This distinction is marked in modern times by the difference between the railroad business as it is usually conducted, where delivery to the consignee is not undertaken beyond its own rails, and the express business, where facilities are usually provided for delivery to the addressee personally. Express companies generally undertake personal delivery to the consignee, and they are, therefore, liable as com-

[39] Fenner v. Buffalo & State Line R. R. Co., 44 N. Y. 505, LEADING ILLUSTRATIVE CASES—from which the above paragraph is virtually quoted.

[40] Missouri K. & T. R. R. v. Cox, 144 S. W. 1196 (Tex. Civ. App.).

mon carriers until delivery, or rather until they have made reasonable efforts to deliver.[41] And obviously the same rules of law govern the performance of the telegraph companies' obligation to get the message to the sendee.

101. **Surrender of goods.**—The modern railroad company provides for delivery of goods at its established stations.[42] The railroad company, moreover, is generally bound to unload the goods from the cars before delivery may usually be said to have taken place. But when coal, ore, grain, or oil are shipped in bulk and in carload lots, as they generally are, the consignee may properly insist, if he has a private siding connected with his premises, or if there is a public siding adjoining his premises, that the cars shall be shunted to his premises, for only in this way can such bulk freight be conveniently unloaded.[43] In practically all cases where delivery at private siding is conceded, it is held that when the car is placed upon the siding the liability of the carrier ceases.[44] And this may also be true where at request of the consignee the car is put upon a special siding and he is given access thereto.[45]

102. **Setting down passengers.**—The obligation to the passenger upon a railroad is fully performed when the passenger has been allowed to alight at the station of his destination and has safely left, or

[41] Bullard v. American Express Co., 107 Mich. 695, 65 N. W. 551.

[42] Louisville & N. R. Co. v. Higdon, 149 Ky. 321, 148 S. W. 26.

[43] Olanta Coal Co. v. Beech Creek R. Co., 144 Fed. 150.

[44] Independence Mills Co. v. Burlington C. R. & N. R. R. Co., 72 Iowa 535, 34 N. W. 320.

[45] Rice v. Boston & W. R. Corp., 98 Mass. 212, LEADING ILLUSTRATIVE CASES.

has a reasonable opportunity safely to leave, the station.[46] In the case of a street railway company it is fulfilled by leaving the passenger when he has arrived at his destination, safely in the street.[47] It has been held that, if passengers are given permission to remain upon the conveyance for a time after their destination is reached, they will remain passengers until they have had a reasonable time to leave in addition to the extension of time granted.[48] But the act of a passenger remaining upon the premises of the carrier after arriving at his destination for an unreasonable time deprives him of his rights as a passenger. And if the passenger jumps off the car, he cannot complain that the company did not protect him. It would seem, however, that the passenger should be warned of an approaching danger of which he obviously is not aware.[49]

103. **Performance according to instructions.**—It would seem that completion of performance, according to the instructions given by the person entitled to give directions, would always be justifiable, in the absence of complicating circumstances. Thus, delivery to the consignee would normally be a discharge from all further liability; and so would delivery to the consignor be, if title has not passed to the consignee.[50] But delivery to the true owner under any circumstances will be a full excuse to the

[46] Louisville & N. R. R. Co. v. Keller, 104 Ky. 768.

[47] Creamer v. West End St. Ry. Co., 156 Mass. 320, LEADING ILLUSTRATIVE CASES.

[48] Chicago, K. & W. Ry. Co. v. Frazer, 55 Kans. 582, 40 Pac. 923.

[49] Montgomery St. Ry. Co. v. Mason, 133 Ala. 508, 32 So. 261.

[50] Louisville & N. R. R. Co. v. Britton, 149 Ala. 552, 43 So. 108.

carrier, no matter with whom it has had dealings.[51] Where a bill of lading is issued, delivery according to its terms will usually be considered the performance of the undertaking; and, therefore, it is often said that the carrier may require the production of the bill of lading before it can be asked to deliver the goods. A distinction should be made, however, which is not invariably observed. A carrier which has issued an "order" bill of lading delivers the goods to anyone else than the holder of the bill of lading at its peril, as the commercial community deals with such bills as representing the goods themselves.[52] But it is usually held otherwise as to the "straight" bill of lading, for it would be hampering business too much to hold the carrier liable for delivering to the addressee without his producing the bill.[53]

104. **Delivery to the designated person.**—Delivery by the carrier to a person other than the person designated or his authorized agent is a misdelivery, for which the carrier is absolutely liable, even if there is no negligence that can be imputed to it.[54] But if the negligence of the shipper is a factor in the mistake, then the carrier is excused, as where the address of the consignee is so wrongly given as naturally to mislead the carrier. It makes no difference what care the carrier may have taken in deciding which is the proper person to whom to de-

[51] Stiles v. Davis & Barton, 1 Black 101 (U. S.).

[52] Arkansas Southern Ry. Co. v. German Nat'l Bk., 77 Ark. 482, 92 S. W. 522.

[53] Forbes v. Boston & L. R. R. Co., 133 Mass. 154.

[54] Illinois Central R. R. Co. v. Parks, 54 Ill. 294.

liver the goods.[55] The rule is that the carrier must, at its peril, fulfill its obligation by delivering to the right person. There is a noteworthy conflict of authority in that class of cases where a swindler, taking a name and address practically the same as that of an established concern in good credit, orders goods shipped to him. When the carrier subsequently delivers the goods to the swindler, it is in many cases held liable for a misdelivery, and held responsible, therefore, for the loss of the goods.[56] But there are strong opinions to the effect that in such cases this is delivery by the carrier to the party designated by the consignor, and that it is, therefore, a proper performance of the obligation.[57]

[55] Lake Shore & M. S. R. R. Co. v. Hodapp, 83 Pa. St. 22.
[56] Price v. Oswego & S. R. R. Co., 50 N. Y. 213.
[57] Samuel v. Cheney, 135 Mass. 278, LEADING ILLUSTRATIVE CASES.

OBLIGATIONS OF PUBLIC EMPLOYMENT

CHAPTER XI.

JUSTIFICATION FOR REFUSING SERVICE.

105. **Grounds for refusing service.**—The principles of public service already discussed establish the prima facie duty resting upon one who is committed to a public employment to serve all who come within his public profession. To excuse himself from rendering such service he must show justification, and that excuse must be based upon public policy. Once committed to public employment he can no longer refuse his service at his caprice. When the obligation of public service is clearly established, by showing that there is a plain case within the public undertaking, all conditions precedent being satisfied, the only method of avoiding liability is to show that there is justification for the suspension of service in general, or some special excuse for the particular refusal.

It is obvious that justification for refusal to serve must be upon reasonable grounds, relating to the performance of the service in question, and such excuse must show that the particular request is truly

improper.[58] It will be noted throughout this chapter that this justification by which one engaged in public service may refuse service is not confined to those obvious cases where rendering the service would involve the proprietor as a participant in illegality of some sort. The true extent of public duty depends in last analysis upon public policy.

106. **Subservience to governmental authority.**— Obedience to executive orders constitutes the most obvious head of justification for refusal to serve. Thus military necessity might justify the declaration of an embargo, in which case a steamship line would be obliged to tie up its vessels and refuse further freight. Similarly departmental regulations forbidding the passing of trains into territory opened for settlement until noon of a certain day may be shown in justification of interruption of service.[59] The same excuse results from obedience to the lawful commands of another of the third great departments exercising governmental authority—the judiciary. Perhaps the plainest case of this justification was where an irrigation company of which the service was asked was under an injunction ordering it not to render such service.[60] In the same way legal processes duly served excuse a carrier from making delivery of goods which it has undertaken to carry; and a carrier may suspend delivery pending litigation involving the goods in question.[61]

[58] Regina v. Sprague, 63 J. P. 233 (Eng.), Leading Illustrative Cases.
[59] Decker v. Atchison T. & S. F. R. R. Co., 3 Okla. 553, 41 Pac. 610.
[60] Sample v. Fresno F. & I. Co., 129 Cal. 222, 61 Pac. 1085.
[61] Skinner v. Chicago & R. I. R. R., 12 Iowa 191.

107. **Statutes expressly controlling service.**—A carrier will, of course, have an excuse for not accepting additional passengers who offer themselves after the vessel has its statutory complement.[62] So, if it is illegal for a railroad to let its cars stand in the street, it can refuse to permit goods to be loaded upon that part of a spur which is laid through a street, without being liable for discrimination in so refusing.[63] Where an explicit ordinance of the Board of Health forbids the transportation of corpses except when accompanied by a person in charge having a transit permit containing specified information, a railroad may refuse transportation when all of this information is not filled in.[64] And where a revenue law directed that a stamp should be affixed to a telegram, it was held that a telegraph company might refuse to accept a telegram without a stamp.[65] The general principle underlying these cases is plain. The law will not drive one to disobey the law.

108. **Service of aid to criminals.**—It is equally obvious that those who conduct a public service are not bound by their general obligation to render service to criminals, where it would furnish them with an opportunity to commit crime. Thus it would seem that a pickpocket could be refused as a passenger.[66] A railroad should not be obliged to

[62] The Charles Nelson, 149 Fed. 846.

[63] Louisville & N. R. R. Co. v. Pittsburg & K. Coal Co., 111 Ky. Law Rep. 960.

[64] Lake Erie & W. R. R. Co. v. James, 10 Ind. App. 550, 35 N. E. 395.

[65] Western Union Telegraph Co. v. Waters, 139 Ala. 652, 36 So. 773.

[66] Coppin v. Braithwaite, 8 Jurist 875 (Eng.).

carry one whose ostensible business might be to injure the line, one fleeing from justice, one going upon the train to assault a passenger, commit larceny or robbery, or any crime, as was said in one case where the issue was whether it was bound to carry persons who were traveling for the purpose of gambling.[67] A confederate officer going to rejoin his command could have been refused passage by a railroad within the union lines.[68] And a telegraph company could refuse to transmit a forged message knowing it to be such.[69] The explanation of these decisions is clear enough. One may always refuse to involve himself in a crime.

109. **Promotion of immoral business.**—There are several cases involving prostitution which test these principles. In none of them is the general problem so well worked out as in a recent case where a telephone company refused to give further service to a bawdy-house.[70] A court will not compel a water company to furnish water, or a light company to supply light, to a house used for carrying on an illegal business. The courts will enjoin or abate—not aid—a public nuisance. Similarly a telephone company may not be compelled to keep an instrument in a pool room to be used as an adjunct to a gaming house.[71] Nor is a telegraph company compelled

[67] Thurston v. Union Pacific Ry. Co., 4 Dill. 321 (U. S.).

[68] Turner v. North Carolina R. R. Co., 63 N. C. 522.

[69] Western Union Tel. Co. v. Totten, 141 Fed. 533.

[70] Godwin v. Carolina Tel. & Tel. Co., 136 N. C. 258, 48 S. E. 636, LEADING ILLUSTRATIVE CASES.

[71] Cullen v. New York Tel. Co., 106 N. Y. App. Div. 250, 94 N. Y. Supp. 290.

to furnish service to a bucket shop run in defiance of law.[72] And it seems that, where dealing in market futures is not made criminal although held against public policy, the telegraph company may refuse service.[73] It is also probable that reasonable suspicion of the impropriety of the business is sufficient to make out the excuse in these cases.

110. **Service involving special danger.**—For the protection of those being served, as well as for the protection of the public servant's own interests, a violent, unruly applicant, or one so drunken or insane as to endanger person or property, may be rejected at the outset, or ejected afterwards. Thus one passenger who is attacking another may be ejected by the carrier—principally of course for the protection of the others then receiving service.[74] But even if no guests should happen to be present, for his own protection the innkeeper may refuse to take in one who has attempted to break down his door.[75] If the danger or inconvenience to the carrier or its patrons seems reasonably imminent, although not absolutely certain, there would seem to be sufficient ground to justify the carrier in refusing to perform the service asked. The justification is made out if the carrier has reasonable cause to suppose, and did suppose, that the safety or convenience of other passengers would be endangered by the person in question; and it is not necessary to wait to see if the

[72] Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637.

[73] Gist v. Western Union Telegraph Co., 45 S. C. 344, 23 S. E. 143.

[74] Louisville & N. R. R. Co. v. Logan, 88 Ky. 232, 10 S. W. 655.

[75] Goodenow v. Travis, 3 Johns. 427 (N. Y.).

person believed with reason to be dangerous, is actually so.[76] On the same principles a carrier may refuse an armed man admission to its vehicle, the peculiar danger to other passengers being obvious enough.[77]

111. **Protection from diseased persons.**—For the protection of all concerned with the service the right is obvious also to exclude from association with others those having a contagious disease.[78] Moreover, a person in such a critical condition that her physicians cannot answer for her life may not insist upon transportation, even if accompanied by an attendant.[79] Where a guest is taken ill at a hotel the proprietor, after notifying the sick guest to leave, has the right to remove such guest in a careful and becoming manner, and at an appropriate time to some hospital or other place of safety, provided the life of the guest be not imperiled thereby.[80] This reasoning was followed in a recent case where it was held that a sleeping car company might under proper conditions exclude passengers apparently suffering from contagious disease from its cars, to avoid the danger they might cause to other passengers.[81] It has already been seen that the carrier owes the duty to take all reasonable steps to protect those in its charge from dangers threatening them. If the law imposes this duty upon the carrier, it should justify

[76] Jencks v. Coleman, 2 Sumn. 221 (U. S.).

[77] Flint v. Norwich & N. Y. Transportation Co., 6 Blatch. 158 (U. S.).

[78] Paddock v. Atchison T. & S. F. Ry. Co., 37 Fed. 841.

[79] Connors v Cunard S. S. Co., 204 Mass. 310, 90 N. E. 601.

[80] McHugh v. Schlosser, 159 Pa. St. 480, 28 Atl. 291.

[81] Pullman Co. v. Krauss, 145 Ala. 395, 40 So. 398, LEADING ILLUSTRATIVE CASES.

it in any steps which it feels reasonably called upon to take to protect its passengers from what seems to be a danger to them.

112. **Persons under physical disability.**—The aged and crippled may not be refused service, although some special care must be taken of them. The right of passenger carriage is not confined to persons who are vigorous and sound, but is open to those ailing and infirm.[82] Blind persons and paralyzed people, small children and helpless people, may not expect to journey as others travel.[83] Persons who might be refused if presenting themselves unaccompanied, may insist upon being carried when they do not ask special attention, being accompanied by attendants of their own, unless even with such attendants they would be an extraordinary care to the carrier.[84] But it should be added that, if persons who are apparently incapable are given to understand that they will be helped through, peculiar care must be exercised by those having them in charge to see that their safety is not imperiled, although service involving such peculiar liabilities need not have been undertaken.[85] Moreover, if one is stricken while upon a journey the carrier must care for him until he can be turned over to other aid, as emergencies create special obligations.

113. **General conditions justifying suspension.**—There are many situations in which it is justifiable

[82] Wabash Ry. Co. v. Mathew, 199 U. S. 605, 26 Sup. Ct. 752.

[83] Zachery v. Mobile & O. R. R. Co., 75 Miss. 746, 23 So. 434, LEADING ILLUSTRATIVE CASES.

[84] Southern Ry. Company v. Mitchell, 98 Tenn. 27, 40 S. W. 72.

[85] Anderson v. Atlantic C. L. Co., 77 S. E. 402 (N. C.).

to suspend service in whole or in part. These will be discussed later in dealing with the obligation to have facilities at hand to carry through properly a particular service after it has been undertaken. But it is obvious that the same considerations will justify a refusal to accept new applications for service during the period, as when the company seeks to be excused for not completing in regular course the business already on hand. Without going far into the matter as to the various circumstances which may make suspension permissible, it is enough to point out here that when the management has done the best that could be expected of it under the conditions at the time, it has done all that the law requires. But in the absence of the existence of an exceptional cause, such as the act of God, the public enemy, unavoidable accident or unanticipated inrush of business, which will prevent the performance of its common-law duty to shippers, a common carrier has no right to refuse to receive and transport property offered for shipment.[86] It will be seen that these general considerations apply to service in general; and therein this general justification (impersonal in its application) differs from the particular excuse (personal in its character) which has just been under discussion.[87]

114. **Refusal to receive because of strike.**—Since the carrier undertakes to carry, and to provide servants as well as vehicles for the purpose, it is

[86] This is virtually a quotation from Knight v. Quincy, O. & K. C. R. R. Co., 120 Mo. App. 311.

[87] See also the various instances of justification enumerated in Houston & T. C. R. R. Co. v. Mayes, 201 U. S. 329, 26 Sup. Ct. 491.

bound to do so, and it is therefore remiss in the performance of its undertaking if for any reason it fails to provide sufficient equipment. The fact that it is prevented from doing so by a strike of its employees is, therefore, no defense to it.[88] The case would be otherwise where the strike is a sympathetic one with which the carrier is unable to cope, without failing in performance of its public duty. When, however, the carrier has provided sufficient vehicles and servants to carry, and is prevented from proceeding by the violence of a mob over which it has no control, it is excused from its duties for the time being.[89] And this will be so although by meeting the demands of the strikers the carrier could purchase peace. Mob violence thus furnishes an excuse for delaying service, the obligation to render service being relative—to do the best one can. And yet, as has been seen, if goods taken in charge are destroyed by a mob the carrier is liable absolutely by the peculiar law making it an insurer of all property entrusted to it for transportation.

115. **Service disadvantageous to perform.**—One must not be too nice in serving the public as a whole. Unkempt persons and those in unconventional dress must be taken, as well as loud people, and prize fighters.[90] Militia men or sailors in uniform may not be refused entertainment, nor may scabs or strike breakers be refused.[91] It is no excuse here that such

[88] People v. New York Central & H. R. R. Co., 28 Hun 543 (N. Y.), LEADING ILLUSTRATIVE CASES.

[89] Hall v. Pennsylvania R. R. Co., 14 Phila. 414 (Pa.).

[90] Regina v. Sprague, 63 J. P. 233 (Eng.), LEADING ILLUSTRATIVE CASES.

[91] Atwater v. Sawyer, 76 Me. 539.

service may hurt the business of the concern, or even may lead to actual damage. A carrier may not refuse to carry persons because of their color or race, whatever may be the prejudices current against them in the community.[92] It must be admitted that this requirement may result in pecuniary loss. This is particularly true in the case of innkeeping; but the public duty is nevertheless imperative in this calling, as in all others. However, it would seem to be the plain right of the carrier, or indeed the innkeeper, to assign the different races to different accommodations, since the management of the business is left to the proprietor.[93]

116. **Business policies inconsistent with public employment.**—Those who conduct a private business may adopt such policies as will produce the greatest profits; but those who profess a public employment must not do anything inconsistent with their public duty. Accordingly many policies for getting patrons away from others, or protecting an established customer from competition, which are legal enough in private business, must be held illegal in public business. Thus a carrier may not refuse to deal with those who will not deal with it exclusively, as one may in private business.[94] Likewise one gas company may not agree with another not to serve those already served by the other.[95] A railroad may not refuse to take, at the carload rate, car lots which for-

[92] Chicago & N. W. R. R. Co. v. Williams, 55 Ill. 185, LEADING ILLUSTRATIVE CASES.

[93] Younger v. Judah, 111 Mo. App. 303, 19 S. W. 1109.

[94] Chicago & A. R. R. Co. v. Suffern, 129 Ill. 274.

[95] State ex rel. v. Portland Nat. Gas & Oil Co., 153 Ind. 483, 53 N. E. 1089.

warders have assembled together from various shippers.[96] And a railroad may not carry coal, which it is selling from its own mines for itself, for less than its scheduled rate.[97]

[96] Interstate Com. Com. v. Delaware L. & W. Ry. Co., 220 U. S. 235, 31 Sup. Ct. 392.

[97] New York, N. H. & H. R. R. Co. v. Interstate Com. Com., 200 U. S. 361, 26 Sup. Ct. 272.

CHAPTER XII.

PROVISION OF ADEQUATE FACILITIES.

117. **Basis of the duty.**—It has been seen that the provision of adequate facilities in the conduct of the business which has been undertaken is one of the fundamental obligations resting upon those who undertake a public service. Without the recognition of this duty to provide proper facilities for carrying through the undertaking professed, the general requirement of service would be idle. The modern law goes to the extent of insisting that wherever there is found an undertaking to perform a general service for the community, facilities for performing that service must be provided, although this really means an expansion of the service. It must be plain to anyone familiar with the progress of the law as to the conduct of public employment that it is becoming more searching. Doubtless, as those who conduct these businesses maintain, it will be wise to leave to those responsible for their management a reasonable discretion in every respect. But this does not mean that the law should not arrive at working standards of proper management with sufficient detail to be really effective.

118. **Proper equipment must be provided.**—Regard must be had to circumstances and conditions under which the service is being rendered, the character and extent of the service, its reasonable

and proper requirements, and the means and methods best suited to such service in common use.[98] In a diversified business, such as common carriage, special equipments of various sorts must often be provided. In the case of the railroads very different cars, of course, are requisite for the transfer of passengers and of freight. And although many kinds of freight may be transported in open cars with safety, more kinds require box cars. Where the business which is being done requires it, the cases now hold that the railroad must equip itself with refrigerator cars, ventilator cars, stock cars and tank cars.[99] These cases would seem to justify the generalization, that wherever the territory served by the railroad produces in sufficient quantities commodities which require special equipment for their proper shipment, such equipment should be provided. It should be added that the proprietors of the service are themselves responsible for the proper performance of the service they have professed. They must, therefore, see to it that they have proper equipment to render the service which they have undertaken. Thus, if a railroad bridge is built for a railroad company by reputable bridge builders, but is built so negligently that an accident results, nevertheless the railroad company itself is liable.[1] It may not shift its responsibilities upon the bridge builders. And so a railroad may not, by having its passengers carried in sleeping cars belonging to an independent

[98] State ex rel. v. Atlantic C. L. Ry. Co., 53 Fla. 650, 44 So. 213.

[99] State v. Cincinnati N. O. & T. P. R. R. Co., 47 Oh. St. 130, 23 N. E. 928.

[1] Louisville, N. A. & C. R. Co. v. Snider, 117 Ind. 435, 20 N. E. 284.

company, escape ultimate liability for the safety of the equipment thus provided.[2]

119. **The expansion of present facilities.**—In the case of the municipal service—such as waterworks, gas plants, electric plants, and telephone systems—there are sufficient authorities to the effect that such companies must, to speak in general, be prepared to extend their system throughout their district to meet the reasonable demands of the growing community.[3] If this involves the acquisition of new sources of supply, or a laying of pipes in new streets, or extension of wires to other streets, or the construction of new exchanges,—all these new facilities must be provided to meet the expansion of the business within the community to the service of which the company has committed itself. A reasonable time to make such extensions after the demand has become apparent should be allowed.[4] It has been well said that this obligation to expand is usually dependent upon the existence of a reasonable expectation that the consumption shall become within a reasonable time sufficient to warrant the necessary preliminary expenditure.[5] This undertaking to serve a community should not lay the company open to outrageous demands in individual cases, but only to such service as the community considered as a whole may demand. And in the meantime the company

[2] Pennsylvania Co. v. Roy, 102 U. S. 451.

[3] Pocatello Water Co. v. Standley, 7 Idaho 155, 61 Pac. 518.

[4] State ex rel. Gwynn v. Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, Leading Illustrative Cases.

[5] Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482.

must use its existing plant to best advantage, doing the best for applicants that is possible under the circumstances.[6]

120. **Equipment for expected business.**—What the law requires of one engaged in public service is to furnish facilities sufficient for the usual course of his business, so far as by ordinary forethought he may anticipate it. Where a railroad has provided itself with more cars per mile of track than railroads operating in that territory usually have, and has more cars under contract for early delivery, its excuse is obvious in the absence of other evidence.[7] Even after the need of more equipment becomes apparent it should be realized that it is a long time after orders for rolling stock are placed before it is delivered.[8] There are limitations upon this rule that equipment must be provided to meet expected demands. It is not possible on the basis upon which street car lines are run to provide a seat for every passenger at the rush hours.[9] Nor would it be wise to require a granger railroad to buy cars enough to handle the grain crop in the same week that it is started toward market.[10] The law of public service does not ask outrageous things; a community should not expect a higher grade of service than it is willing to pay for.

121. **No provision for expected business.**—If the press of business might have been provided against

[6] Cumberland Tel. & Tel. Co. v. Kelly, 160 Fed. 316, LEADING ILLUSTRATIVE CASES.

[7] St. Louis S. W. Ry. Co. v. Clay Ginn Co., 77 Ark. 357.

[8] Mauldin v. Seaboard Air Line Ry. Co., 73 S. C. 9, 52 S. E. 677.

[9] North Jersey St. Ry. Co. v. Jersey City, 75 N. J. L. 349, 67 Atl. 1072.

[10] State ex rel. Crandall v. Chicago B. & Q. R. R., 72 Neb. 542, 101 N. W. 23, LEADING ILLUSTRATIVE CASES.

by reasonable diligence of the carrier, there is no such excuse for its failure to provide adequate facilities.[11] The sufficiency of accommodations must be determined by the amount of freight and the number of passengers ordinarily transported on any given line of road. The amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation.[12] If, then, the abnormal demand should have been foreseen by a reasonable management, it is in default unless it has made every effort to meet the emergency. Thus in the conduct of passenger business, when it is known that some exhibition or other event will bring together a large number of people, the transportation lines should make seasonable allotment of facilities to meet the extraordinary demand at this point.[13] In a late case it was held that a railroad company which had obligated itself to furnish refrigerator cars to transport garden truck to market could not escape liability for breach of that duty upon the ground that the crop was unusually large, if it was no larger than might reasonably have been expected from the acreage planted—knowledge of which the railroad company either had, or had the means of obtaining.[14]

122. **Establishment of railroad stations.**—It is everywhere agreed that the state may by statute establish railroad stations wherever the public need

[11] Ballentine v. No. Missouri R. R. Co., 40 Mo. 491, LEADING ILLUSTRATIVE CASES.

[12] Montana W. & S. Ry. Co. v. Morley, 198 Fed. 991.

[13] Chicago & A. R. R. Co. v. Dumser, 161 Ill. 190, 43 N. E. 698.

[14] Yazoo & M. V. R. R. Co. v. Blum Co., 88 Miss. 180, 40 So. 748.

requires them.[15] The more usual method of exercising the legislative power in this regard is by delegation of the determination of the necessity for the establishment of new stations, or the propriety of changing existing stations, to a regulating commission.[16] Of the constitutionality of such legislation and the consequent force of such orders there can be no doubt. But many courts still believe that, without legislative interposition in some form, the railroad companies are free to do as they please in these respects. There are, however, as even these courts realize, principles of law governing this matter so clear that even legislation will be set aside if outrageous. When a station was ordered in a place where it was obvious there was practically no business whatsoever, nor any prospect of any being developed, the court set the statute aside.[17] But it is plainly within the regulating power over public services for the state commission to order the establishment of a station where a railroad is running through a thickly settled region for many miles without making a stop, especially if the residents of such territory have no other adequate facilities.[18]

123. **Power to order stations.**—According to the conservative view relating to the establishment of stations the courts will not presume to order the opening of stations, the decision as to the number of stations requisite being left to the discretion of

[15] Mayor v. Norwich & W. R. R. Co., 109 Mass. 103.

[16] Railroad Commissioners v. Portland & O. C. R. Co., 63 Me. 269.

[17] Louisiana & A. Ry. Co. v. State, 91 Ark. 358, 121 S. W. 284.

[18] Minneapolis, St. P. & S. S. M. R. R. v. Railroad Commission, 136 Wis. 146, 116 N. W. 905.

the directors of the company.[19] This was the attitude taken in the leading case in the Supreme Court of the United States where the court refused to order the reopening of a station which had been closed in the face of a flourishing community, and moved to a point several miles farther on.[20] On the other hand, in the leading case in Illinois, the court without aid of special legislation itself ordered the opening of a station for a community of 1,800 inhabitants through which a railroad was running without stopping.[21] In a more extreme case still the court has recently ordered two railroads to join in the construction of a union station.[22]

124. **Arrangements for delivering freight.**—All the law discussed in this topic is as applicable to freight stations as to passenger stations. The question is whether the existing freight stations are so situated as to meet the reasonable demands of the shippers of the district.[23] There are exceptional businesses where the commercial necessity for private switches is recognized by the common law to be overruling. This is peculiarly true of those who ship or receive freight in bulk. Thus private switches should be permitted at grain elevators, coal tipples, ore smelters and oil tanks, provided the shipments from them are of reasonable size.[24] And the same is true of those who are shippers and receivers

[19] Jacquelin v. Erie R. R. Co., 69 N. J. Eq. 432, 61 Atl. 18.

[20] Northern Pacific Railroad v. Washington, 142 U. S. 492, 12 Sup. Ct. 283.

[21] People v. Chicago & A. R. R. Co., 130 Ill. 175, 22 N. E. 857.

[22] Concord & M. R. R. v. Boston & M. R. R., 67 N. H. 464, 41 Atl. 263, Leading Illustrative Cases.

[23] People v. Delaware & H. C. Co., 52 N. Y. Supp. 850.

[24] Chicago & N. W. R. R. v. People, 56 Ill. 365.

in considerable quantities of such freight as it would be actually impracticable or peculiarly disadvantageous to transport by teams over the roads.[25] A railroad may have elaborate terminals in great cities and only freight sidings at small towns, the question being in all cases whether adequate provision is being made for handling existing business.[26]

125. **Priorities given in emergencies.**—In time of stress when the company involved has not sufficient facilities to meet all demands made upon it for service, it is not enough to say simply that the company is excused from not meeting particular demands upon it. Being in public service still, it must always discharge its public duties, so far as it is able, handling the business demanding its attention, with proper regard to the exigencies of the whole situation. To give one example, it is sufficiently obvious that such service as the company itself needs, in order to maintain its service for the benefit of all concerned, has precedence over everything. Thus a railroad may give coal cars bringing its own coal supply to any point where the supply is low precedence over other shipments.[27] In case of war, troops and their equipment will be given priority over all other business.[28] And in case of public calamity, as the Chicago fire, relief trains may be given precedence over all others.[29] Likewise, a water company

[25] Railroad Commission v. Kansas City So. Ry. Co., 111 La. 133, 35 So. 487.

[26] Michie v. New York, N. H. & H. R. R. Co., 151 Fed. 694.

[27] Louisville & N. R. R. Co. v. Queen City Coal Co., 13 Ky. Law Rep. 832.

[28] Illinois Central Ry. Co. v. Ashmead, 58 Ill. 487.

[29] Michigan Central R. R. Co. v. Burrows, 33 Mich. 6.

is temporarily excused for failing to give its household customers a proper supply when the fire plugs are open in that district to extinguish a fire, if the supply of water for householders was, in all ordinary circumstances, adequate.[30]

126. **Ordinary course of performing service.**— There are general rules of precedence governing service, when no particular emergency appears. Passenger business has priority over freight service, just as the safety of passengers always outweighs the protection of goods.[31] As between two offerings of freight, perishable freight should be sent ahead of other freight.[32] Live stock and perishable fruits constitute the plainest examples of the sort of things for which a special equipment and a fast train schedule are imperatively demanded. Conversely hay and sand, not being perishable, may be delayed in transit in time of stress in favor of other goods.[33] Even as between the same commodities there may be priorities to be observed in emergencies. Goods of special classes, which have a brief market, may be preferred to staple commodities, which are always salable. If the carrier forwards first those goods which are most necessary to the public, it can hardly be said that the carrier is not performing its public duty. But, on the other hand, it will be a safe generalization that no preference is justifiable between goods of the same nature, unless some such public interest appears. Not even a southern carrier may

[30] Campbell v. East London Waterworks, 26 L. T. (N. S.) 475 (Eng.).
[31] Farnsworth v. Groot, 6 Cow. 698 (N. Y.).
[32] Marshall v. New York C. R. R. Co., 45 Barb. 502 (N. Y.).
[33] Southern Ry. Co. v. Atlanta Sand & Supply Co., 135 Ga. 35, 68 S. E. 807.

give King Cotton preference over lumber, as a recent case holds.[34]

127. **Assignment of facilities.**—As the provision of facilities is primarily a question of management, the decision as to the assigning of accommodations should be left to those providing the service, unless they act outrageously. There is fundamental truth in what a court once said, justifying a ferryman in assigning passengers to their seats—the ferryman must be the captain.[35] Upon these principles it was held in a late case that where several street cars were standing at a depot waiting for passengers from an incoming train, a passenger had no right to complain because he was directed to take passage in one car, instead of another.[36] It is equally well established that the innkeeper may, even after a room has once been assigned, direct the guest to change to another room, whether it is agreeable to him or not.[37] However, it has been held that if a passenger has once settled himself in a seat the conductor should not disturb him merely for his own personal convenience.[38] Where there are more applicants for service in the same general class than there are facilities available, the traditional rule has been to serve customers in the order of their application. Thus the normal rule as to telegrams is that they shall be forwarded in order of receipt.[39] And so a steamship

[34] Ocean S. S. Co. v. Savannah L. W. & S. Co., 131 Ga. 831, 63 S. E. 577.
[35] Claypool v. McAllister, 20 Ill. 504.
[36] Dobbins v. Little Rock Ry. & El. Co., 79 Ark. 85, 95 S. W. 794.
[37] Doyle v. Walker, 26 Upp. Can. Q. B. 502 (Canada).
[38] McLain v. St. Louis Ry. Co., 13 Mo. App. 733, 11 S. W. 835.
[39] Western Union Telegraph Co. v. Ward, 23 Ind. 377.

company should assign berths to passengers in the order of their application.[40]

128. **Rules for car distribution.**—In the case of railroad service, it is obviously impossible to regulate the order of accepting goods according to the time of offers for shipment over the whole line. Reasonable treatment must be accorded each station, and each given its fair share of the available supply.[41] While it may be difficult to lay down any general rule upon this subject sufficiently accurate in its terms to cover all cases that may possibly occur, still it can be approximated by saying that the means of transportation must be so distributed at the various stations for receiving passengers and freight along the entire lines of the road as to afford a reasonable amount of accommodation for all.[42] When it becomes a question of the assignment of facilities to applicants in the same locality, it is now realized that fairness to all concerned requires that there should be careful apportionment of the facilities available.[43] What is the fair share of each shipper is a matter with which the courts are still wrestling at present; but some things are clear enough. Rules established for car distribution between carrier and shippers based upon their normal requirements will not be set aside as unreasonable.[44]

[40] Patterson v. Old Dominion Steamship Co., 140 N. C. 412, 53 S. E. 224.

[41] Ballentine v. No. Missouri R. R., 40 Mo. 491, LEADING ILLUSTRATIVE CASES.

[42] Ayres v. Chicago & N. W. R. R., 71 Wis. 372, 37 N. W. 432.

[43] State ex rel. Crandall v. Chicago B. & Q. R. R. Co., 72 Neb. 452, 101 N. W. 23, LEADING ILLUSTRATIVE CASES.

[44] United States v. West Va. No. Ry. Co., 125 Fed. 252.

CHAPTER XIII.

DETERMINATION OF REASONABLE CHARGES.

129. **Principles for determining reasonableness.**—A rate which is reasonable from the point of view of the customer served may not be reasonable to the company serving. The interest of the company is entirely directed toward framing a schedule of rates which as a whole shall produce a certain return. So long as the requisite return is realized, it is immaterial to it what the proportion of contribution of each individual customer is to the whole amount. On the other hand, the customer is interested in the individual rate charged to him, and in that alone. So long as his rate is a fair one it is immaterial to him that the whole schedule is so arranged as to yield a great profit to the company. It is only within a comparatively few years that there has been any attempt to work out this problem, but great progress has been made of late in the development of the law governing rate making. It may now be determined with sufficient certainty whether a schedule of rates taken as a whole is producing too much. And one may even give a judgment upon the reasonableness of the particular rates composing that total. It might be added that the public service commissions having power to fix rates have gone much farther in developing this science of rate making than the courts have found it necessary to go in

revising the system of rates established by public authority.

130. **Reasonableness of the schedule as a whole.**—The reasonableness of the schedule as a whole depends upon whether it yields a fair return upon the capital invested by the proprietors of the service. This is largely a mathematical question governed by principles which may now be said to be well recognized.[45] The public service company is entitled first of all to pay all its expenses of operation. These include not only the actual disbursements for operation in each year, but also certain annual charges which must be paid before any real profit is realized. Moreover, the company is entitled to gain a fair profit upon its reasonable capitalization. What constitutes a reasonable capitalization, and what is a fair return, are matters not altogether clear according to the authorities as yet. But, generally speaking, it may be said that by the present policy a total return will be allowed in normal cases sufficient to yield the company a net profit above proper charges equal to that which would be realized from any other business where the capital and the risk were the same.[46]

131. **Theories as to proper capitalization.**—In order to decide upon what principles the amount of capital devoted to a public service, and therefore entitled to a return, is to be estimated, it is important to note the various theories which have been brought forward for determining what amount is proper.

[45] Missouri K. & T. R. R. Co. v. Love, 177 Fed. 493.

[46] Coal & Coke R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613.

Thus the outstanding capitalization is by a few still regarded as sacred,[47] while at the other extreme are those who refer everything to what might be shown to be the bare cost of substantial reproduction at the present moment.[48] But to most persons both of these standards seem essentially unfair, either to the company concerned or to the public served. And the real controversy it is submitted is between the two remaining theories, the original cost of the property in question to its owners,[49] or the fair value of the property at the present time.[50] It will be seen that, although these amounts may sometimes nearly approximate each other, there is such an inherent difference between these cases that one or the other must ultimately be adopted in a particular case.

132. **Fair percentage of return.**—It is now generally conceded that a proper return upon the true value of the property devoted to the public use ought in all normal cases to be protected. If rates are so reduced by public authority as to leave no such adequate return, it is now said that the owners are in effect deprived of their property. It is not only a due consideration for the rights of others who have already invested their money in public services, but also an enlightened selfishness with a view to the future which dictates the present policy that a reasonable return upon the value of the property de-

[47] Consolidated Gas Co. v. New York, 157 Fed. 849.

[48] Steenerson v. Gt. Northern Ry., 69 Minn. 353, 72 N. W. 713.

[49] Brymer v. Butler Water Co., 179 Pa. St. 231, 36 Atl. 249, LEADING ILLUSTRATIVE CASES.

[50] Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, LEADING ILLUSTRATIVE CASES.

voted to the public service shall be protected by the Constitution.[51] In determining the measure of return upon property devoted to public use, regard should be had to the character of the business, the locality and the risk, whether the return will be uniform and secure; whether the patronage is steady or fluctuating and quickly responsive to financial and commercial changes, interest rates—legal and contractual—and the rates customarily sought and required in like investments in the locality; if a railroad, the character of the traffic, whether largely of a kind dependent upon uncertain conditions or so diversified that causes affecting part will not greatly affect the whole.[52]

133. **What are operating costs.**—A public service corporation should, therefore, be allowed to take from its public enough to give it a fair return upon reasonable capitalization over and above all operating expenses and annual charges. It is to a certain extent plain enough what are properly chargeable operating expenses. Wages and salaries, materials and supplies—these are allowed as matters of course unless there is a suspicion that they are being inflated.[53] Rentals and insurance assessments and taxes are annual costs and must be taken care of out of present rates. No one will deny that current repairs should come out of current earnings; and everyone will concede that all new construction should be provided for by additional capital. There

[51] Stanislaus v. San Joaquin, etc., C. & Irr. Co., 192 U. S. 201, 24 Sup. Ct. 241.

[52] Simpson v. Shepard, 33 Sup. Ct. 729, Leading Illustrative Cases.

[53] Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 Sup. Ct. 400.

remains the debatable ground of improvements and betterments.[54] It is possible to prevent the company from allowing for anything of this sort out of annual earnings; but the more advantageous course for all concerned would seem to be to sanction any policy in this regard which any company may adopt, provided it is within the bounds of reason. Here as elsewhere it is a matter for the company to work out in the first instance for itself.

134. **Annual charges for amortization.**—There are other annual charges to be taken into consideration. In general, an annual charge for depreciation in value of the plant by use is proper. This is again a matter which cannot be decided by general rules as to a standard percentage, but is a matter of careful investigation into the character of each particular business. It is now seen that the question of depreciation is too difficult for offhand estimation. The courts have as yet usually contented themselves with saying that some fair per cent should be allowed.[55] A well conducted company may, indeed, see to it that provision is made for the renewal of equipment which is obviously deteriorating, but few indeed are making under present conditions provision against the slow but sure depreciation of the plant as a whole. Now that it is becoming recognized in the decisions that such allowance is a proper operating cost, more attention will doubtless be paid to this vital matter. Sinking funds, however, are hardly

[54] Illinois C. R. R. Co. v. Interstate Com. Com., 206 U. S. 441, 27 Sup. Ct. 400, LEADING ILLUSTRATIVE CASES.

[55] Long Branch Comm. v. Tintern Manor Water Co., 70 N. J. Eq. 71, 62 Atl. 474.

permissible in public service.[56] Those who raise capital to build plants put the property at the disposal of the public for a return upon that capital; they cannot expect a return of that capital disguised as a sinking fund.

135. **Theories as to rate making.**—Various theories as to the making of particular rates are still in vogue. Apparently the more lawyerlike persons would base all particular rates upon the cost of the service to the company, while the more businesslike persons would make the universal test the value of the service to the patron. Opportunists would leave the making of rates to competition, while paternalists would attempt to equalize the advantage to customers in making rates. However various they may seem, these theories as to the proper basis of rate making align themselves into two opposing groups. First: there is the legal which gives chief place to the cost of service.[57] Second: there is the economic, which makes the value of the service the basis.[58] There used to be these two schools as to the whole schedule, one maintaining that the total receipts which a public service company might take were limited by law, the other asserting that the corporations were entitled to what they could get out of the public. This matter of the whole schedule has so long been settled against economic freedom and in favor of legal restriction, that no one would reopen

[56] Houston & T. C. R. R. Co. v. Storey, 149 Fed. 499, LEADING ILLUSTRATIVE CASES.

[57] Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, LEADING ILLUSTRATIVE CASES.

[58] Interstate Com. Com. v. Chicago Gt. W. Ry. Co., 141 Fed. 1003.

the controversy with any hope of success. The history of the basis for determining the separate rates of the whole schedule must follow the same course.

136. **Proper proportion of total costs.**—The total amount of gross receipts which a public service company is justified in taking from its whole business has been briefly discussed. These are in brief all annual expenditures, including an allowance for upkeep, and in addition the fair capital charges for the year, arrived at by determining what would be in the particular case a reasonable return upon proper capitalization. The fairest way to all concerned to determine the price for any particular service would seem to be to apportion ratably the total disbursements of every sort to the various items of business, and so arrive at proportionate rates.[59] Theoretically, certainly, any other method is less just to all concerned. In determining thus what is a reasonable rate for a service to be rendered, it is not proper to take the plant as existing and as maintained, and to regard as the whole cost of any subsequent service merely the increased expense necessary to add to its business the service in question.[60] The cost of each service ought to include its fair share of the interest on investment and of the general expense; and it is necessary, therefore, to consider what rules there may be devised for proper apportionment.

137. **The unit of service.**—The computations described in this chapter may be carried with advan-

[59] Pennsylvania R. R. v. Philadelphia County, 220 Pa. St. 100, 68 Atl. 676, LEADING ILLUSTRATIVE CASES.

[60] See Atchison, T. & S. F. Ry. Co. v. United States, 203 Fed. 56.

tage one step farther, to the determination of the average cost per unit of service. Thus of any given gas company it may be said that it is entitled to take as gross receipts from its whole business a certain sum, determined by adding together its operating expenses, including therewith all proper maintenance charges, and its fixed charges. Then if the probable sales, judged by its actual sales, amount to approximately certain thousands of cubic feet, its proper average price per cubic foot may be found. In testing freight rates, the most difficult problem of all, this standard is the ton-mile cost. If the sum of the whole amount of freight carried is one hundred thousand ton miles, and the gross revenue required from freight be two thousand dollars, the average rate of freight will be two cents per ton mile. If there were no other factors in the problem, therefore, a fair proportionate rate would be the ton-mile average charge.[61] Owing, however, to other factors which cause a difference between commodities with respect to the fair charge for carrying them, a uniform ton-mile rate applied to all cases would not result in reasonable rates.[62]

138. **The rate as an entirety.**—The idea of the law has always been that the rate was an entire thing. For instance, as the whole freight is an indivisible unit, it is obvious that without some new arrangement between the parties the carrier will not be entitled to any freight whatever for goods not de-

[61] Atlantic C. L. Ry. Co. v. Florida, 203 U. S. 256, 27 Sup. Ct. 108, LEADING ILLUSTRATIVE CASES.

[62] Tift v. Southern Ry., 138 Fed. 753.

livered at the destination.[63] Where, therefore, the carriage is interrupted when partly completed, since there is no delivery at the destination, the freight is not due; and since freight is an entirety there is nothing which can properly be recovered, in the absence of a new agreement.[64] Where delivery is made of part of the goods only, it is not possible to divide the shipment into separate units, and recover freight for as many such units as are delivered.[65] On the other hand, if the goods arrive in specie, but have been damaged without fault of the carrier, entire freight is due. Even if they arrive damaged by fault of the carrier, so long as they are still in specie, the owner must receive them and rely upon a cross action for damages.

[63] Cargo ex Argos, L. R. 5 P. C. 134 (Eng.).
[64] Braithwaite v. Power, 1 N. D. 455, 48 N. W. 354.
[65] Western Transp. Co. v. Hoyt, 69 N. Y. 230.

CHAPTER XIV.

PREVENTION OF DISCRIMINATION.

139. **The development of the rule.**—The rule against discrimination is the latest development of prime importance in the law governing public service. It must be plain to all that there has been distinct evolution in the law governing public employment during the last twenty-five years. A comparatively few years ago it was held that if a public service company served all at reasonable rates it performed its obligation. So long as one received service at a rate which was reasonable in itself, it used to be maintained that he had no ground for complaint even if another similarly circumstanced was getting service at a lower rate. But it was said that if others were paying a lower rate than the complaining party this would be persuasive evidence to show that he was being charged an unreasonable rate. It is only within this last generation, however, that it has been appreciated that any discrimination is truly inconsistent with public duty. Indeed, it was bitter experience that forced the establishment of this law rather than any process of logical deduction. But nowadays it is stated as a matter of course that the duty owed to all alike involves the obligation to treat all alike.[66]

[66] Messenger v. Penn. R. Co., 8 Vroom 531 (N. J. L.), LEADING ILLUSTRATIVE CASES.

140. **What constitutes illegal discrimination.**—Not only are the outright discounts and the bold rebates of the earlier time illegal today, but any device by which the charge to a shipper is made less than the schedule rate is now held discrimination. Thus free cartage for the collection and delivery of freight for certain shippers only, is an illegal rebate.[67] And the allowance to certain shippers of a certain sum for the use of their private sidings, is another case of illegal reduction.[68] As such obvious devices have thus become too dangerous, more elaborate schemes have developed for getting an advantage in rates. Many large concerns have organized, often, as a separate concern, an industrial railway from their premises to the trunk line. And posing as a connecting carrier they attempt to obtain from the trunk line a division of the rate to market.[69] Another late scheme is the organization of a dummy transportation company by a manufacturing company to carry its products to market, getting as payment not only the rental of their special cars at extraordinary high rate, but a virtual commission for furnishing the business.[70]

141. **Adherence to the scheduled rate.**—The strict provisions against rebating in the recent legislation are based upon an ingenious and apparently effective plan. A schedule of rates prepared by the railroad must be filed with the commission, and duly published as required. When this has been done,

67 American Sugar Rfg. Co. v. Delaware L. & W. R. R., 200 Fed. 652.
68 Chicago & A. Ry. Co. v. United States, 156 Fed. 558.
69 United States v. Atchison, T. & S. F. R. R. Co., 142 Fed. 176.
70 United States v. Milwaukee Refrig. Transit Co., 145 Fed. 1007.

the rate so scheduled may not be changed by the railroad without the filing and sufficient publication of a new rate. The doctrine is carried to such an extent that even if a shipper is at first charged a lower rate quoted him by a freight agent, he can be compelled to pay the difference between this and the schedule rate.[71] If the rate so published is unreasonable in itself or otherwise disproportionate, nevertheless the shipper may not accept nor the railroad grant a departure from it. The shipper's remedy is a complaint to the commission, which will result, if successful, in a reduction in the future and in damages for past unfair exactions. It follows that not only are rebates to favored individuals, and even special rates for good reasons, if they have not been publicly offered, made illegal, but it is also criminal for railroads or shippers to receive or give less than the published rates, even though both parties agree that the published rates are unreasonable and discriminatory.[72]

142. **Special concessions to large customers.**—It has not been uncommon for the managers of public service corporations to make lower proportionate rates to larger than to smaller customers. In the older times this was practiced openly as there was then no recognized rule against discrimination as such. But even in these later days it is often attempted to defend this practice on principle.[73] For

[71] Texas & P. R. R. v. Mugg, 202 U. S. 242, 26 Sup. Ct. 628.

[72] Goodridge v. Union Pacific R. R. Co., 37 Fed. 182, LEADING ILLUSTRATIVE CASES.

[73] Silkman v. Water Commissioners, 152 N. Y. 327, 46 N. E. 612, LEADING ILLUSTRATIVE CASES.

this policy is of great importance to the managers of public services who may often see the opportunity to get large amounts of valuable business, highly profitable in the aggregate even at lower proportionate rates, if they can still maintain higher proportionate rates upon the regular business which they get from smaller customers who are not in a position to dictate their terms. That this policy may often be advantageous in public business, as it is in private business, may be admitted, but it has already been seen that public duty may conflict with business policies. If, therefore, these concessions to larger shippers are in conflict with the public duty which the common carrier owes to smaller shippers, they must be held illegal as unjust discriminations.[74] This will be the clearer when it is shown that the favoring of such large shippers will give them such commercial advantages that they may crush out their small competitors in the common markets. The prevalent rule forbidding the granting of special reductions to larger shippers, as such, on the ground that they furnish a greater aggregate of business to the common carrier, seems, therefore, a necessary part of the law forbidding all personal discrimination.

143. **Lower rates to exclusive customers.**—Undoubtedly there is a commercial advantage in being able to adopt the policy of promoting exclusive arrangements with desirable customers, by offering reductions. The essential illegality of this policy appears most plainly, as has been seen in other connections, when there is an outright refusal to serve

[74] Scofield v. Lake S. & M. S. R. R. Co., 43 Ohio St. 571, 3 N. E. 907.

those who deal with a rival.[75] A railroad may not refuse to take freight from a shipper who formerly shipped by it exclusively, but has now made arrangements to ship part of his freight by another line. If the public service company may not refuse to serve for the promotion of its own business interests, no more may it discriminate to obtain the advantages which may accrue to it if it may make lower rates to those who deal exclusively with it; but this policy would still prevail in making rates in competitive business doubtless, as it once did, were it not for the modern recognition of its essential illegality.[76] That such a policy may be advantageous to the company which employs it may be granted, but it has already been seen that those who conduct a public employment must forego many methods of getting business and holding it which are permissible in private affairs.

144. **Service in more convenient units.**—The most obvious application of the principles under discussion is the relatively lower rate almost universally quoted for carload lots as compared with less than carload. Substantial reasons exist for making the rate lower per barrel in carload lots than in less than carload quantities.[77] The cost of service is very considerably less in the case of car shipments. Altogether the economies of handling freight in carload lots are apparent. A rate per 100 pounds in less than carload lots may well be twice the rate

[75] Menacho v. Ward, 27 Fed. 529.

[76] Hays v. Pennsylvania Co., 12 Fed. 309, LEADING ILLUSTRATIVE CASES.

[77] New York T. & M. R. R. Co. v. Gallaher, 79 Tex. 685, 15 S. W. 694.

upon carload lots and not be unreasonable. Furthermore, shipments in bulk, as of oil in tank cars, are much cheaper to handle than in carloads of barrels; and a correspondingly lower rate may be given. But, as it is the business of the railroad to see that none of its patrons are put to disadvantage, a railroad failing to supply tank cars for those who own none must charge a barrel shipper the bulk rate only.[78]

145. **Allowances made for facilities.**—It was formerly not open to question that where the customer furnished part of the facilities for his services a special rate could be charged him. Thus where a coal dealer furnished a wharf for his shipments an arbitrary reduction on his rates passed muster some years ago.[79] With the rigorous enforcement of the law against all discrimination in late years, such arrangements as have been just described are being condemned, if not as virtual discrimination, at least as a cover for discrimination. At all events, the whole facts will be gone into to discover whether too advantageous terms are being obtained. Thus in a recent case it was discovered that a car company was getting so much for the use of its cars that the reduction was being made the basis for reduced rates to those who shipped in those cars. And in another recent case not charging certain shippers demurrage for cars, upon what apparently was a private siding, while others paid demurrage in regular yards, was held to constitute discrimination. However, the

[78] State v. Cincinnati N. O. & T. P. R. R. Co., 47 Ohio St. 130, 23 N. E. 928.

[79] Root v. Long Island R. R., 114 N. Y. 300, 21 N. E. 403, LEADING ILLUSTRATIVE CASES.

railroads are still allowed to make arrangements with those customers furnishing their own facilities. Those who get allowances which are not scheduled will, however, fall foul of the modern statutes against discriminations, even if the allowances made are proper enough in themselves, since the legality of every charge depends upon the schedule published.[80]

146. **Difference in rate between freight classes.** —It has been pointed out that there are great differences between the rates payable for transportation for the same distances upon goods in different classes. There is no fixed percentage for fixing the differentiation even of the six classes usually established; still less is there any definite rule for the differences to be made between commodities with extra class rating. But it is matter of common knowledge that there are great differences between rates payable by the different classes, the highest class usually paying for the same transportation many times what is paid by the lowest class. All that can be said in general is that the principles as to rate making apply here as elsewhere, and that the burden must be thrown upon the various classes without outrageous disproportion.[81] The principles governing this matter have already been given. If the charge is excessive as compared with the charges of the same corporation for other commodities of like bulk and weight, value and risk, it would seem to be improper. That such comparisons are generally re-

[80] Chicago & A. R. R. v. U. S., 156 Fed. 558.

[81] Cincinnati H. & D. R. R. Co. v. Interstate Com. Com., 206 U. S. 142, 27 Sup. Ct. 648.

sorted to is proof enough that the rule against disproportion is generally observed.[82]

147. **Unjust rates between localities.**—At common law the public servant deals with the individual; except under a statute a community as such cannot complain of a discrimination against its inhabitants. Thus at common law it is the shipper who complains of discrimination. Whatever may be the present law as to the right of a customer in one locality to complain that his rates are disproportionately high as compared with those charged other customers of the company in other localities, it is certain that such discrimination is in itself evidence that the higher charge is an unreasonable one. Thus, whenever a rate between two points is attacked by an individual shipper as unreasonable in itself, as evidence in support of the complaint he may show that rates are lower for a similar haul between other points. Under modern legislation, however, this rate complained of may be so outrageously disproportionate as to constitute a violation of statutory provisions;[83] but if a rational defense can be made for the higher rate the courts have been inclined to permit it to stand. Thus under the federal legislation forbidding different charges unless the circumstances were dissimilar, competition existing between two points was held to justify a lower rate than that maintained between intermediate points where there was no competition.[84]

[82] Interstate Com. Com. v. Chicago Gt. W. R. R., 209 U. S. 108, 28 Sup. Ct. 852.

[83] Interstate Com. Com. v. Louisville & N. R. R., 118 Fed. 613.

[84] Texas & P. R. R. v. Interstate Com. Com., 162 U. S. 197, 16 Sup. Ct. 666.

148. **Relative discrimination inconsistent with public duty.**—It is submitted, therefore, that the public service law will not be satisfied in the end unless with some reasonable degree of certainty each applicant who requires a service is charged his proportion of the total cost, including in that cost, over and above all current and fixed charges, a fair return upon proper capitalization. It must be admitted that the law relating to disproportion is still in the making; it is as indefinite as the law relating to discrimination was twenty-five years ago. In the same way to-day, very probably there is no well recognized law against disproportion as such. Provided each applicant for different service is quoted a rate which is reasonable in itself, it may be that there is no redress by established law, however outrageous the disproportion may be, although it seems to be agreed that these palpable differences may of themselves be evidence that the higher rate is unreasonable in itself. And yet it is quite in the line of the evolution of the public service law that a rule against disproportion, as such, may eventually be recognized, despite the fact that it might interfere with the business policies of the public companies even more than the present rule against outright discrimination has done. For it seems plain that the same principles which forbid any differences when the conditions are the same, should prohibit disproportionate differences when the conditions are different. A charge for any particular service which is based upon the outlay caused is undeniably in accord with sound reason and policy.

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QUIZ QUESTIONS

PUBLIC SERVICE COMPANIES COMMON CARRIERS

(The numbers refer to the numbered sections in the text.)

1. Distinguish between the duties of a public service corporation and of a private corporation in their dealings with patrons and customers.
2. State briefly the origin of what are known in our law as public service corporations.
3. Name and define five public service corporations and in each case state whether or not an individual, should he be engaged in the same line of business, would be subject to the same rules as is the corporation.
4. What is the basis for public control of or intervention in private enterprises?
5. What is meant by a monopoly?
6. In considering the question of unfairness in competition what would you say ought to be the controlling element?
7. A is the owner of a warehouse and dock privileges. Does that fact subject him to the rules and regulations governing public service corporations?
8. Are telegraph and telephone corporations rated as common carriers?
9. To what extent, if at all, may a public service corporation justify apparently excessive charges?
10. What is the theory upon which public service corporations are granted franchises embracing exclusive rights and privileges?
11. A owns a building which he furnishes as a hotel, and starts

in business. Does he thereby subject himself to the duties and obligations of one engaged in public service?

12. A is engaged in the grocery business; B purchases goods from him and desires to have them delivered at his home. Is A obliged to accommodate him?
13. What is the chief characteristic of public employment?
14. Jones, living in a small town where there is no hotel, occasionally furnishes lodging and meals to applicants. Does he thereby become an innkeeper?
15. A, desiring to express one hundred pounds of dynamite, properly boxed, offers to pay the charges for shipment thereof. Must the express company transport the same?
16. Where a corporation professes to transact two lines of business, one of a public, the other of a private nature, may it be held to a public duty in matters relating to the private business?
17. A demands that a railroad company furnish him cars with which to ship stock; the company fails so to do and A suffers loss thereby. May he recover against the railroad company?
18. A gas company is operating in a town of 5,000 inhabitants. A new enterprise is established in that town, bringing with it many employees, some of whom apply to the gas company for service. Must the gas company serve them?

19-20. A corporation has been conducting the business of a wharfinger. It now desires to abandon that business. How shall it go about accomplishing this purpose?

21. State the distinction in law between the duties of public service corporations and those of private corporations, or individuals not engaged in public service enterprises.
22. What is the underlying principle of the liability of a corporation or individual engaged in public enterprise?
23. May the public as a body politic maintain an action for loss occasioned by the fault of a public service corporation, or must such actions be instituted by the individual suffering special injury?
24. May a public service corporation defend an action brought against it to compel performance of its duties, on the ground that the contract relied upon was made with a person under legal disability?

25. A seeks to recover against a common carrier for injuries to his person; he fails to show that the relation of carrier and passenger existed. Has he any other ground upon which he may recover?
26. A public service corporation contracts with the tenant of certain premises to furnish him water, but fails to do so. Who may maintain the action, the tenant or the owner of the premises?
27. A railroad company sees fit to operate its own express cars. In the absence of express legal provisions forbidding this, may it be prevented from so doing?
28. An express company has a contract with a railroad company extending over a number of years; the railroad company abrogates it; litigation follows. What interest, if any, has the public in such litigation?
29. A railroad extends from A to B; a person desires to ship goods to C, a point beyond B; the railroad refuses to accept goods for shipment beyond B. May the intending shipper maintain an action?
30. A desires to ship goods from New York to San Francisco by rail, and makes a contract with a railroad company which agrees to carry and deliver them. The goods are lost in transit, but beyond the termination of the line of the original carriers who made the contract. Against whom should the shipper bring his action?
31. An applicant for a certain service agrees to comply with all reasonable rules and regulations; the public service company has made its own rules and regulations. Who is to decide whether or not they are reasonable?
32. A tenders baggage at a railway station; the company has not the facilities at hand to forward it until the following day; A suffers loss. May he recover?
33. One desires to ship goods. When and where should he offer them to the carrier for shipment?
34. May the carrier require the passenger or the shipper to enter into a contract regarding carriage or shipment?
35. A tenders for shipment a piano, unboxed and otherwise unprotected. Is the railroad company justified in refusing to receive it?

36. What duty rests upon the carrier with reference to discrimination between persons generally?
37. What protection has a public service corporation against loss of the amounts that may become due for its services?
38. The carrier or innkeeper does not demand payment in advance, but accepts the goods of the passenger or guest, as the case may be. Does this fact have any effect upon the duties and obligations of carriers and shippers or innkeepers and guests, respectively?
39. What is the rule regarding the unit of service as applied to public service corporations?
40. Jones is a shipper, and is in arrears to the railway company for charges on prior shipments. He tenders other goods for shipment and offers to pay charges in advance. Must the railroad company accept these goods?
41. May a common carrier by special contract become a private carrier?
42. A delivers goods to a common carrier for shipment on Monday; but the goods are not shipped on that day; on Thursday a fire occurs and the goods are destroyed. Is the liability of the carrier that of warehouseman or common carrier?
43. Suppose A, desiring to make a shipment of goods, delivers to the railroad company a warehouse receipt for such goods. Does this constitute delivery to the carrier?
44. A, desiring to become a passenger, goes upon the premises of the carrier in an intoxicated condition and so causes a disturbance. Is the carrier bound to receive him?
45. The carrier is a corporation; its agent undertakes to transport goods on his own account, but this fact is unknown to the shipper; the goods are lost. Is the carrier liable?
46. A enters an inn for the purpose of becoming a guest; he places his valise in a chair, but while he is in the act of entering his name upon the register, the valise disappears. May he maintain an action against the innkeeper?
47. To what extent is a carrier liable for injuries to one riding upon its conveyance who has failed to comply with reasonable rules and regulations relating to his carriage?
48. A farmer ships a carload of cattle and accompanies them

to market for the purpose of caring for them en route. Does this relieve the carrier of liability, as such?

49-50. State the scope and limitations of the regulations which a public service company may prescribe.

51. A procures a check for his baggage upon the back of which are printed restrictions as to value; the baggage is lost. May A recover beyond the amount of such limitations as to value?

52. A person enters a train and refuses to pay the regular fare. What may the conductor lawfully do?

53. May a carrier require that freight for shipment be tendered at a certain place and within a certain time prior to the departure of trains?

54. Assuming the schedule in operation is adequate, what notice, if any, is the carrier required to give when it desires to make substantial changes therein?

55. What, if anything, may the public supplying company do to prevent wastage in the thing supplied?

56. A street car company posts notices in its cars to the effect that the conductor will not furnish change beyond the amount of $2. Is this regulation valid?

57. The subscriber to telephone service neglects to pay the charge in advance; the service is cut off, to his damage. Has he any remedy?

58. Is it lawful for the carrier to establish a regulation requiring additional compensation from those not procuring tickets before entering its trains?

59. A ticket is presented to the conductor of a train; it is bad on its face. May the conductor in all circumstances refuse to accept such ticket?

60. If a person is improperly refused passage upon a train by the conductor, is the conductor liable, or is the carrier liable?

61. What degree of diligence is required of the carrier in the performance of its duties as such?

62. To what extent, if at all, is the carrier liable for delay in the transportation of goods? of passengers?

63. As between connecting carriers, what, if anything, will excuse the second carrier for unreasonable delay?

64. What is meant by deviation and under what circumstances will it render the carrier liable for loss?
65. Where deviation is proved is it necessary to establish negligence to maintain an action?
66. The carrier selects the more dangerous of two routes, by reason whereof the goods are lost. Is the carrier liable?
67. A passenger, fearing assault, appeals to the conductor for protection. What ought the conductor to do?
68. A conductor, without just excuse, assaults and injures a passenger; the passenger brings action against the carrier. May he recover?
69. A passenger entrusts his hand baggage to the conductor. If it is lost through the negligence of the conductor, may the passenger recover from the carrier?
70. Robbers enter a train, and the train crew makes no effort to prevent it; a passenger is robbed. May he maintain an action against the company?
71. Suppose the relation of carrier and passenger does not exist at the time of an assault by the conductor. May the company be held liable?
72. An innkeeper, with knowledge, exposes a guest to infectious disease in his hotel, and the guest becomes ill. May he recover against the innkeeper?
73. What is the liability of a common carrier for the loss of goods properly entrusted to it for shipment?
74. What is meant by liability as an insurer and to what extent is such liability applicable to carriers of goods?
75. What degree of care must the carrier of passengers exercise to relieve itself of responsibility for personal injuries suffered by them?
76. In the case of purely gratuitous services, what is the liability of the carrier of goods?
77. What constitutes baggage and what is the liability of the carrier in case of its loss or damage?
78. Is a sleeping car company subject to the same rules of law with reference to its liability, as govern innkeepers?
79. Under what circumstances may a telegraph company be held liable for mistakes in the transmission of messages?
80. A company furnishing electric light undertakes to wire a

house; the wiring is defective and a fire occurs. May the owner suffering the loss maintain an action?

81. If the carrier defends on the ground that loss was occasioned by an "act of God," what must he prove?
82. What is meant by "the public enemy" and under what circumstances may it be available as a defense to the carrier?
83. Suppose the shipper does not truthfully disclose the fact that the goods are perishable and loss occurs through this fact. May the shipper recover in such a case?
84. After delivery to the carrier the shipper, without the knowledge of the carrier, does some act which increases the probability of the loss of the goods, and loss actually occurs. Is the carrier liable in such a case as an insurer?
85. In what manner, if at all, may carriers and innkeepers limit their extraordinary liability?
86. Is a general notice issued to the public by the carrier of goods sufficient to protect it against liability as an insurer?
87. May a carrier, by private contract with the shipper, relieve itself from liability for loss occurring through its negligence?

88-89. To what extent does public policy enter into contracts between public service corporations and their patrons?

90. A tenders a package to a common carrier for shipment, fixing the value thereof at $50, and is charged a rate based on such valuation. In case of loss what is the extent of his recovery?
91. A bill of lading provides that all claims for loss or damage to goods thereunder must be made within ninety days. May the carrier rely upon such stipulation?
92. What degree of care must the carrier observe regarding its employees and to what extent may it exempt itself therefrom by contract?
93. Does the law of the public service govern when the carrier undertakes to transport goods or passengers gratuitously?
94. A person receives a pass from a carrier; the pass recites that the carrier will not be liable for injuries. Under what circumstances, if at all, may such passenger recover?
95. An express messenger is injured in an accident resulting

from the fault of the carrier. What must he show in order to recover?

96. What evidence would you offer to establish the fact that the defendant is a public service corporation?

97-98. The carrier delivers goods safely at their destination and places them in its warehouse; consignee, though notified, does not immediately remove them; fire occurs and the goods are destroyed. What is the carrier's defense, if any?

99. Is the carrier of goods by freight bound to give notice of their arrival to the consignee? If such notice be given, what is the duty of the consignee?

100. How far does custom regulate the actual delivery of goods to the consignee by the carrier?

101. What distinction obtains regarding the duty of the carrier in the delivery of goods in packages and the delivery of goods in carload lots?

102. A passenger on a delayed train upon arriving at his destination found a heavy rainstorm then raging, and requested the privilege of remaining in the coach; this was granted him by the conductor. When did the relation of carrier and passenger terminate?

103. Is the carrier protected by making delivery to the true owner of the goods, irrespective of who may be consignor and consignee?

104. Where the carrier is not at fault, but delivers to the wrong person as consignee, will it be liable to the consignor or true consignee?

105. A public service company wrongfully refuses to serve an applicant. What must it show in order to avoid liability?

106. There is a general strike upon a railroad; the government interferes. Does this abrogate the duty of the carrier to accept goods and passengers?

107. A steamship is permitted by law to carry 1,000 passengers; A applies for passage subsequent to the receipt of the 1,000 passengers on board and is refused. May he maintain an action?

108. May a carrier of passengers refuse to receive one who it knows desires passage for the purpose of engaging in a game of chance while upon the train?

109. A dramshop applies for and secures telephone service; thereafter its license is revoked, but the keeper undertakes to continue the business. May the telephone company lawfully refuse further service?

110. A passenger suddenly becomes violently insane. What ought the conductor to do?

111. A conductor learns that a passenger is ill with smallpox. May he insist upon the passenger leaving the train without refunding the fare?

112. Is a carrier bound, without additional compensation, to afford special facilities in the care of persons under physical disability, as for instance a blind person?

113. What state of facts will justify a carrier in suspending service in whole or in part?

114. A general railway strike occurs, and grows to such proportions that the authorities are unable to control it. May the carrier successfully plead this as an excuse for failure to carry?

115. State the general rule of law with reference to the right of public service corporations to refuse service to particular persons or classes of persons?

116. Several farmers combine to make a large shipment of stock; they place it in the name of one man and tender it to the carrier. May the carrier properly refuse to accept it?

117. State generally the extent to which public service corporations are bound to furnish proper facilities for their patrons.

118. A teamster is injured owing to his wagon breaking down by reason of defects; the employer shows that the wagon was purchased from a reputable concern and was regularly inspected for repairs. May plaintiff recover?

119. It becomes necessary for a municipality to extend its water mains. How should it proceed to do so?

120-121. A railway company, operating its line through a farming section, is called upon to move an unusually large crop. If unable to move it promptly, is the company liable?

122-123. A railway company arbitrarily places its station at an

inconvenient point. May it be forced to move this station? If so, in what proceedings?

124. State the general rule governing carriers of freight as to providing adequate facilities for receiving and shipping.

125. The coal supply of a railway company is becoming exhausted. Will the company be justified in taking another company's coal from cars in shipment, after tendering due compensation therefor?

126. May the shipper by special contract and payment of extra compensation secure superior facilities both as to time and accommodations?

127. A becomes a guest of an inn and is assigned a particular room after he has examined and approved of it. What right, if any, has the innkeeper arbitrarily to change A to another room less desirable, even though for a smaller compensation?

128. State in a general way the duty of a carrier of grain and live stock as to providing facilities to move the shipments.

129-132. Under what circumstances may carriers and shippers fix their own rates for transportation? In this connection would you take into consideration the amount of the capital invested by the carrier?

133-134. In determining the question of proper charges, what deductions, if any, should be made from the gross receipts of public service corporations?

135. State your idea of the true basis for rate making by public service corporations.

136-138. In establishing through rates for shipment, is a carrier permitted to charge an excessive rate over a portion of the route and a diminutive one over the remainder?

139-140. A and B, two shippers from the same point, apply for rates on the same class of goods; through favoritism A receives a lower rate than B. Has B any remedy?

141. A railway company, being required to publish its rates, does so. May all intending shippers depend upon receiving service at these rates?

142-143. Under what circumstances, if any, may the carrier, in making rates, take into consideration the volume of business given him by the shipper?

144. Upon what theory may the carrier make a less rate for carload lots than on package freight of like classification?
145. What is meant by discrimination in making rates and to what extent is the rule against it now enforced?
146. In fixing rates for carriage a carrier makes a much higher rate on certain commodities than on others. Under what circumstances will this be upheld?
147. A carload of sugar is shipped from Chicago to a point distant 150 miles at a certain rate; upon the same train is a carload of sugar in transit to a point 200 miles from Chicago. The cost of shipment for the latter consignment is less than for the former. May the first shipper effectively complain?
148. Discuss relative discrimination by public service companies from the standpoint of their public duty.

PART II

PUBLIC OFFICERS AND ELECTIONS

BY

EDWIN MAXEY, D.C.L., LL.D.*

INTRODUCTORY.

1. **Increasing importance of the subject.**—In order that the state may act, it must do so through agents. These agents we call public officers. As the activities of the state increase, because of the massing of population, the number and the duties of the agents through whom the state performs its work must necessarily increase. In a rural community, the functions of government are comparatively limited: there is little which the state must do. The supply of water, food, light, means of transportation, fire protection, prevention of nuisances, may all be regulated with but very little intervention on the part of the government. But not so in a large city, where the conditions of life and organization of industry have so far increased the dependence of all upon the acts of others that rules regulating conduct increase in geometric ratio and the necessity for their enforce-

* Professor of Public Law and Diplomacy, University of Nebraska; former Dean of the Aurora Law School; Professor of Public Law, West Virginia University. Author of various articles on public law and diplomacy.

ment becomes a matter of vital concern. An isolated farmer may keep hogs near his house, and the annoyance thereof is a matter which he may endure if he wishes, as it does not vitally concern his neighbors; but this is not so if he lives in a city. His business must then be regulated with a due regard to the health and comfort of others affected by his business. The same is true of one operating a glue factory or slaughter-house. These are but illustrations of a multiplicity of activities which in a city must be regulated under the police power. This increase in the amount of work to be done by public officers is one of the great facts in American life, which means that the number, powers, and duties of public officers are increasing and that therefore the law of public officers is becoming an increasingly important branch of our system of jurisprudence.

The term "administrative law" is used in two senses: a broad and a restricted sense. In the former, it includes all questions of public administration, such as civil service, municipal government, highways, elections, schools, and public revenue. In this sense, it presents problems not merely for the lawyer but for the political scientist as well. As the warrant for the exercise of administrative power must be found in the constitutions or in statutory legislation, questions of administrative law very often resolve themselves into questions of constitutional or statutory construction. On the continent of Europe, all positive statutory law is looked upon as coming within the scope of administrative law. But in the more restricted sense, administrative law deals with

the protection of private rights, the mode of exercising administrative power, and the remedies in case of the abuse of the power. In other words, it deals mainly with the law of public officers and extraordinary legal remedies. It is in this latter sense the term is generally used in the United States. While in England and the United States the courts still exercise a considerable degree of control over the acts of administrative officers, this control has in France been almost entirely removed, and to a considerable extent in the other countries of continental Europe. A comparison of these differences in point of view belongs to the field of comparative administrative law.

Those interested in this phase of the subject will do well to read Comparative Administrative Law, by Frank J. Goodnow, published in 1893. Though the European practice eliminates much of the dissatisfaction and irritation caused by the resistance of the judiciary to the prompt realization of the will of the majority, it does not furnish as good a guarantee for the protection of the rights of the minority, and hence is less conservative than is the American view.

CHAPTER I.

DISTINCTION BETWEEN OFFICE AND EMPLOYMENT.

2. **What is an office.**—In order that we may distinguish officers from employees, it is necessary that we distinguish an office from an employment. In extreme cases this is not at all difficult. We have no trouble in deciding that the man who works under contract at a dollar a day in digging a ditch to lay water pipes for a city owning its water plant is not exercising the duties of an office, but following an employment. But the matter is not always so free from doubt. The city engineer directing the work may be either an officer or an employee. If the city cares to put him in the latter class, it may do so by entering into a contract with him. This is the view taken by the Supreme Court of the United States in the case of Hall v. Wisconsin.[1] Here it was held that if the state had entered into a contract with a surveyor, in accordance with a statute directing the governor to make such a contract, the surveyor was an employee, not an officer. The court quotes with approval from the case of Davis v. Gray:[2] "When a state descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice* (for this particular affair) as a private person itself, and is bound accordingly."

[1] 103 U. S. 5.
[2] 16 Wall. 203 (U. S.).

In United States v. Maurice,[3] Chief Justice Marshall says:

"An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer. * * * Although an office is an 'employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or to perform a service, without becoming an officer. But if the duty be a continuing one which is defined by the rules prescribed by the government, and not by contract, which an individual is appointed by government to perform, who enters upon the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer."

And in United States v. Hartwell,[4] the court, speaking through Justice Swayne, says:

"An office is a public station or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. * * * A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."

In Clark v. Stanley,[5] we find this definition of a public office:

[3] 2 Brock. 96 (U. S.).
[4] 6 Wall. 385 (U. S.).
[5] 66 N. C. 59.

"A public office is an agency for the state, and the person whose duty it is to perform this agency is a public officer. * * * The oath, the salary, or fees are mere incidents and constitute no part of the office. Where no salary or fees are annexed to the office, it is a naked office—honorary—and is supposed to be accepted merely for the public good. This definition also excludes the idea that a public office must have continuance. It can make no difference whether there be but one act or a series of acts to be done; whether the office expires as soon as the one act is done, or is to be held for years, or during good behavior."

In determining in a given case whether we have an office or an employment, the courts will consider how the functions have been regarded, as there are some duties so universally considered official that the one performing them is always regarded as an officer; how the one who performs the work was chosen, if by election, appointment, or by contract. With reference to the class of work commonly done by experts, it is optional with the state whether it shall be done by officers or by employees. What the state has intended in this respect and what it has done is of course a question for the courts.

3. **Why the distinction is important.**—The practical importance of this distinction arises from the fact that the term for which an employee is secured may not be arbitrarily shortened by the state without his consent, and if it is so shortened he has an action for damages. In other words, his agreement with the state is a contract within the meaning of the term in the Federal Constitution forbidding any state to

impair the obligation of contracts.[6] His right is a certain, definite, fixed, private property right which he can enforce in the courts. For the legislative or executive branch of the government to deny or override this would be to confiscate his property, and it is to prevent this that the framers of the Constitution inserted in that instrument the above provision. But this is not true of the right of an officer to continue in office for any specific length of time. The legislature may, unless his office is one created by the Constitution, abolish his office and bring his term to an end at any time without giving him any right to damages for the loss of his position. It may be very disappointing to him and result in considerable loss, but it is what is known in the Roman Law as *damnum absque injuria* (loss without injury).

In contrasting private contracts of employment with the tenure of a public officer the Supreme Court of the United States says, in substance, in the case of Butler v. Pennsylvania,[7] that private contracts for employment are clearly distinguishable from the engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public welfare shall require. The selection of officers, who are nothing more than agents for the effectuating of public purposes, is a matter of public convenience or necessity, and so, too, are the periods for the appointment of such agents; but neither

[6] Const. of U. S., Art. I, § 10.

[7] 10 How. 402 (U. S.), LEADING ILLUSTRATIVE CASES.

the one nor the other can constitute any obligation to continue such agents, or to reappoint them, after the measures which brought them into being have been abrogated as detrimental to the well-being of the public. The promised compensation for services already earned during the term of service of the officer may undoubtedly be claimed, both upon principle of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts not desired, would appear to be reconcilable with neither natural justice or common sense.

The establishment of such a principle would necessarily clog everything like progress or improvement in government; or if changes should be ventured upon the government would have to become one great pension establishment on which to quarter a host of sinecures. It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and repeal laws; and to create and change or discontinue the agents designated for the execution of those laws. Such a power is indispensable to the preservation of the body politic, and for the safety of the individuals of the community. It is true that this power, or the extent of its exercise, may be controlled by the higher organic law or the constitution of the state, as is the case in some instances in the state constitutions and in the Federal Constitution. The latter instrument has seen fit to protect the salaries of supreme court judges and the President against revision downward by the legislature. A sufficient explanation of this

exception to the rule is that it was thought best that one coördinate branch of the government should not be left to the mercy of the other. While then an employee may not have the power and prestige of an officer he has some advantage in the greater security of his tenure.

4. **Right to office not a property right.**—As it may be regarded as established law in the United States that the right to office is not contractual, so may it be regarded as settled that the right to office is not a property right, and hence does not come within the provision of the Fourteenth Amendment to the Constitution against depriving of property without due process of law. In the case of Taylor v. Beckham,[8] the Supreme Court of the United States affirmed a decision of the Court of Appeals of Kentucky, that the right of the governor or lieutenant governor to hold office was not a property right and hence did not come within the provision of the Fourteenth Amendment, but, being created by the state constitution, was conferred and held solely in accordance with the terms of that instrument and laws passed pursuant thereto, so that in respect of an elective office, a determination of the result of an election, in the manner provided, adverse to a claimant, could not be regarded as a deprivation forbidden by the amendment. The court, speaking through Chief Justice Fuller, there says: "The view that public office is not property has been generally entertained in this country." The decisions are numerous that public offices are mere agencies, or trusts, and not property

[8] 178 U. S. 548.

as such. Nor does the fact that the Constitution may forbid the legislature from abolishing a public office or diminishing the salary thereof during the term of the incumbent, change its character or make it property. In short, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. But when one has been duly elected to office, has qualified and entered upon the duties of his position, though the legislature or other controlling power may abolish the office, the officer may not be ousted, except upon proper legal proceedings wherein good cause is shown.

CHAPTER II.

CREATION AND FILLING OF OFFICES.

5. **How an office is created.**—Having examined the nature of an office and attempted to distinguish it from an employment and from a property right, the next matter for consideration is the way in which offices are created. The very important ones have been created by the Constitution. But these are a relatively small portion of the whole number. By far the greater number of offices are created by the legislature. In doing this no particular form is necessary, nor is this a power which the legislature may not delegate to a municipality.[9] For it would, indeed, be unwise for a legislature to attempt to say just what officers are needed by a large city. Considerations of expediency make it advisable that considerable latitude be left to the judgment of the municipality in determining what agents it shall use in performing its governmental functions. The reason for the existence of a city government rests upon the fact that in a densely populated area a special set of problems arise which demand special treatment, and that whether a given function is of sufficient importance to demand the creation of a special agency for performing it can best be judged by those who can study the situation at close range. It would be a

[9] State v. Hyde, 129 Ind. 296; Miller v. Warner, 42 N. Y. App. Div. 208.

hardship upon a municipality for the legislature to create offices which the local situation did not demand, but the expense of which would have to be borne by the locality. Sinecures are bad enough when created by those who have to bear the expense, but intolerable when created by those who do not have to bear the burdens.

6. **Who is a public officer.**—Since there is a lack of definiteness as to what is a public office there is, of course, the same indefiniteness as to who is a public officer. The following are the principal definitions of the words "office" and "officer," which have been given in England: "It is said that the word 'officium' principally implies a duty, and in the next place the charge of such duty, and that it is the rule that where one man hath to do with another's affairs, against his will and without his leave, that this is an office, and he who is in it is an officer. Officers * * * are public or private; * * * and it is said that every man is a public officer who hath any duty concerning the public; and he is not the less a public officer, where his authority is confined to narrow limits, because it is the duty of his office, and the nature of that duty which makes him a public officer, and not the extent of his authority."[10]

"In my opinion," said Lord Chief Justice Best, "every one who is appointed to discharge a public duty, and receives compensation, in whatever shape, from the crown or otherwise, is a public officer." Blackstone includes offices among incorporeal hereditaments, and defines an office to be "a right to ex-

[10] Throop, Public Officers, § 2.

ercise a public or private employment, and to take the fees and emoluments thereunto belonging." In a case involving the question of whether or not an "attendant" upon a court of record in the city of New York is a public officer, the Supreme Court of that state, speaking through Justice Danforth, in the case of Rowland v. Mayor of the City of New York,[11] says: "He not only owes a duty to it (the court), and is to perform such duties as are by it required to be performed, but as we have already said, those duties are in aid of the proper business of the court * * * and his employment is one in which the public are interested; its proper exercise requires capacity, diligence, and attendance. Whether we look into the dictionary of our language, the terms of politics, or the diction of common life, we find that whoever has a public charge or employment, or even a particular employment affecting the public, is said to hold or be in office. However, therefore, the signification of the word used is ascertained, it will comprehend the position of the plaintiff as stated in the record, for although his functions may be those of service, his employment is by the public, and the duties intrusted to him are official and a public charge."

The extent of the territory within which the duties are to be exercised is, of course, immaterial; provided the duties are such that the state is charged with the task of performing them, the agent through which it acts is a public officer.[12] It is also clear that as the state may require service gratis, the presence or ab-

[11] 83 N. Y. 372.
[12] People v. Bedell, 2 Hill 196 (N. Y.).

sence of emoluments is no test. It is equally clear that, as the state may dictate the conditions under which the services may be rendered, the requirement of or the failure to require an official oath is not at all conclusive.[13] In Commonwealth v. Evans,[14] the Supreme Court of Pennsylvania, speaking through Justice Sharswood, says: "All persons, who by authority of law, are intrusted with the receipt of public moneys, through whose hands money, due to the public or belonging to it, passes on its way to the public treasury, must be so considered, by whatever name or title they may be designated in the law authorizing their appointment, and whether the service be general or special, transient or permanent." But the fact that one handled no money for the public would, of course, not prove that he was not a public officer. Upon the question of whether or not attorneys, solicitors, counsellors, and barristers, are public officers, we have, in this country, a conflict of authority. In Ex parte Garland,[15] the Supreme Court of the United States holds that they are not. The Supreme Court of New York has decided in 2 Cowen 29 that they are and in 20 Johnson 492 that they are not. In England they are generally regarded as public officers. In Walmesley v. Booth, Lord Hardwicke says: "They are to be considered as public officers and ministers of justice."[16] The weight of authority in the United States is that they are not public officers.

[13] People v. Langdon, 40 Mich. 673.
[14] 74 Pa. St. 124.
[15] 4 Wall. 333 (U. S.).
[16] Barn. Ch. 475 (Eng.).

7. **Classification of public officers.**—Officers are classified by Bacon into (1) civil and military; (2) public and private; (3) ancient and those of new creation; (4) judicial and ministerial. The third division is not recognized in the United States. Judge Cooley divides public officers into legislative, executive, judicial, administrative, and ministerial, but admits that an accurate classification is difficult, if not impossible. He says:[17] "The duties imposed upon the officer are supposed to be capable of classification under one of these heads: the legislative, executive, or judicial; and to pertain accordingly to one of the three departments of the government designated by those names. But the classification cannot be very exact, and there are numerous officers who cannot be classified at all under these heads. The reason will be apparent if we name one class as an illustration. Taxing officers perform duties which in strictness are neither executive nor judicial, though in some particulars they merely execute the orders of superiors, and in others they judge for themselves what is to be done. But sometimes, also their duties partake of the legislative. All such officers are usually called administrative, while inferior executive officers are designated ministerial."

Justice Clifford, speaking for the court in Fitz Patrick v. United States,[18] makes the following classification: "Offices may be and usually are divided into two classes—civil and military. Civil offices are also usually divided into three classes—political, ju-

[17] 2 Southern Law Review U. S. 531.
[18] 37 Ct. of Cl. 332.

dicial, and ministerial. Political offices are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as the president, or head of a department. Judicial offices are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose, and not by deputies. Ministerial offices are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior."

The revised statutes of New York make the same classification as Judge Cooley in the article quoted above.

8. **Method of filling offices.**—In the absence of constitutional restrictions, the legislature may provide any method it wishes for filling offices. Whether the officer shall be chosen by an election or by appointment is a matter of expediency of which the legislature is, in the absence of constitutional provisions, the judge. Though there is a strong tendency in this country toward selecting public officers by popular election and the constitutions have in many cases required it, where such provisions do not exist the legislature may provide for election or appointment by any of the coördinate branches of the government or even by private associations such as legal or medical societies, and In re Bulger[19] the Supreme Court of California sustained a statute conferring upon the board of fire underwriters authority to appoint the city fire commissioners. It is usual to leave to the coördinate branches of the government

[19] 45 Cal. 553.

the power to appoint their subordinate officers, and, in the absence of constitutional provisions, this right may be conferred by statute even though it violates the theory of separation of powers. In the case of In re Janitor of Supreme Court[20] it was held that the courts might appoint their own subordinates and that it was doubtful if the legislature could deprive them of this right.

In this case a janitor of the court had been removed by the superintendent of public property. The court says: "It is a power inherent in every court of record and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar and a power so essential to the conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it. As a power judicial, and not executive or legislative, in its nature, and one lodged in a coördinate branch of the government separate and independent in its sphere of action from the other branches, it seems to be under the protection of the Constitution, and therefore a power which cannot be taken from the court, and given to either the legislative or executive departments, or to any officer of either of those departments."

9. **Nominations.**—It is not unusual for the suggestion of names and the final choice of public officers to be made by different individuals or even by different branches of the government. The power of the Senate to reject nominations made by the

[20] 35 Wis. 410.

President is an instance. In the case of popular elections the nomination is usually made by the party organizations, but here also there is a strong tendency toward popularization. The direct primary which gives the individual voter a direct voice in making nominations, as well as in elections, is supplanting the convention system in many states, and while its working is not entirely satisfactory it will, in those states where it is once adopted, be very difficult to get back to the convention system. Men are as a rule very loath to give up political power and rarely do so except under compulsion. But in this case it is difficult to see how the voter once in possession of the right to vote in primaries could be coerced into surrendering his right. Where the right is provided for in the Constitution it would be practically impossible to take it away and where it is provided for by statute it would be almost equally difficult to repeal it in states where the referendum prevails. Given human nature as it is, an extension of the system of primary elections is far more probable than the abolition of it.

10. **Effect of nominations.**—The usual effect of a nomination by a party acting through the medium of a convention or primary is to give the nominee the right to have his name appear on the ballot at the election under the caption of his party as its regular candidate for the office. But if there are irregularities in the convention or primary, either because of a split in the convention or doubtful eligibility of those taking part in the primary or other causes, the remedy of the one claiming the regular nomination

is not clear. Whether the decision of the party organization acting through its committees is final, or whether the courts may, by mandamus, order his name placed upon the ballot as the regular candidate of his party and entitled to the exclusive use of the party caption, is a matter upon which the courts are not entirely agreed. Neither is it agreed whether or not the legislature may confer such power upon the courts. The New York courts have exercised the power under a statute of this sort and in that state the constitutionality of the statute does not seem to have been raised.[21] But in the case of Stephenson v. Board of Election Commissioners,[22] a leading case, the court refused to grant a mandamus to one claiming the nomination under the certification of the regular officers of a convention, which had split and made two nominations, and ordered that the names of both nominees appear on the ballot. The court thus refuses to take the responsibility of deciding upon the regularity of election of delegates and proceedings of the convention, but places it upon the voters.

In justifying this position it argues that "the voters must protect themselves against fraud upon their convention or misconduct of its delegates, officers, and candidates, and when a considerable faction of the convention leaves the meeting, and nominates a ticket, claiming to be the representative of the party, it is not the province of the courts to determine upon technical grounds that it is not,

[21] In re Fairchild, 151 N. Y. 359.
[22] 118 Mich. 396.

and that its action is void, and deny it a place on the ballot, thereby defeating the purification of methods within the party, or to say which faction was right and which wrong. It is a right of the voter to repudiate wrong and corruption and fraud, if it exists, and to prevent or unearth and defeat corruption, and he should not be hampered by technical rules. If in this case this convention was unable to conclude its business in harmony, and the delegates divided and made two nominations, they should not be denied the privilege of going to the polls with both. Each nominee is here contending that he represents the only pure Republicanism of the district and is the lawful nominee of the true party.

"The electors must decide between them. In such case we know of no way of determining which of these names ought of right to go upon the Republican ticket. If it were left to the voters, there would doubtless be an honest difference of opinion upon the rights of the question. The same may be true of the boards. They may not know what they should do and we cannot tell them further than to say that, under the admitted facts and precedents, both are entitled to places upon the ballot."

11. **Who may vote for public officers.**—If, then, contested nominations must be settled by the voters it becomes necessary to determine who may vote at elections for choosing public officers, because the qualifications of voters at such elections are not necessarily the same as at other elections. In the United States the people acting through their constitutional conventions have the right to say who shall possess

that mark of membership in the political state, which we call the right to vote. This they may do in general terms or in detail. Most commonly they pursue the former method and leave to the legislature the task of making statutory provisions for the details necessary to deciding who shall vote and how the right shall be exercised. The Constitution of the United States originally left the matter of deciding who had a right to vote to the states. It took the Civil War to change this, and the Fifteenth Amendment forbids discrimination by the state on account of "race, color, or previous condition of servitude." Though this has remained to a considerable extent a dead letter, it is an assertion of the right of the Federal Government to override the power of the states when occasion demands. The Federal Government may yet find it necessary to forbid any who are not citizens of the United States from voting in elections of federal officers. At present a great many who are not citizens of the United States but have merely declared their intention to become such are permitted by the states to vote in state and federal elections. The time, place, and manner of holding elections is left to the states except that the day for choosing presidential electors shall be the same throughout the United States, and the place of choosing United States senators may not be changed, by the states.

12. **Registration.**—When not forbidden by the Constitution, the legislature has power to pass registration laws excluding from participation in the election those who fail to comply with such laws. This is considered a legitimate means of regulating

the exercise of the elective franchise and preventing corruption in elections. But it must be bona fide for the purpose of regulation, and not disfranchisement under the guise of regulation. As said by Chief Justice Thompson in Page v. Allen: "The right must not be impaired by the regulation. It must be regulation purely, not destruction. The regulation must be subordinate to the right to be regulated." Registration laws do not add to the constitutional qualifications, as such provisions respecting the qualifications of voters must contemplate the application of reasonable methods for the purpose of preventing fraud and imposition upon election officials. They provide a means of examining into the voter's claim to a right to vote. And if the Constitution "has made no provision in regard to the time, place, and manner in which such examination shall be had, and yet such an examination is necessarily incident to the actual enjoyment and exercise of the right of voting, it constitutes one of those subjects respecting the mode of exercising the right in relation to which it is competent for the legislature to make suitable and reasonable regulations not calculated to defeat or impair the right of voting, but rather to facilitate and secure the exercise of that right."[23] These general principles have been recognized by the courts of Connecticut, Rhode Island, Ohio, Iowa, Illinois, Michigan, Nebraska, Tennessee, and Mississippi. But in White v. County Commis-

[23] 58 Pa. St. 338; Capen v. Foster, 12 Pick. 485 (Mass.), opinion of Chief Justice Shaw; Kinneen v. Wells, 144 Mass. 497, LEADING ILLUSTRATIVE CASES.

sioners,[24] the Supreme Court of Oregon held that where the Constitution prescribes the qualifications of voters, a statute imposing the additional requirement of registration is unconstitutional.

13. **Question of reasonableness.**—If, then, a provision of a registration law is reasonable, the weight of authority in this country is that it is not unconstitutional unless expressly forbidden by the Constitution. But for the purpose of determining whether or not a particular provision in a registration act is reasonable only the most general rules can be laid down. Where a person is required to take an oath embracing a qualification different from that prescribed in the Constitution, and is refused registration unless such oath is taken, such requirement is unconstitutional and void.[25] The same is true of a provision requiring an oath that he has not been guilty of certain acts, the effect of which would be to forfeit his right of suffrage.[26] But it is not unlawful to require him to take an oath as to residence, citizenship, or the like,[27] provided he is not required to supplement his own oath by the oath of others as to his qualifications. A provision requiring one who had been absent from the state for a specified length of time to present a certificate showing that he had been continuously on the tax list is unconstitutional in states having no property qualifications for voting. Likewise a provision requiring one who had been absent from the state for six months to be reg-

[24] 13 Oregon 317.
[25] Page v. Allen, 58 Pa. St. 338.
[26] Burkett v. McCarty, 10 Bush 758 (Ky.).
[27] People v. Hoffman, 116 Ill. 587.

istered at least ninety days before the election would be unconstitutional where the length of residence in the precinct is fixed by the Constitution at thirty days.[28] And in State v. Corner[29] it was held that a registration law requiring one to be registered ten days before election was unreasonable, where no provision at all was made for registration on election day.

A like view has been taken by the courts of Ohio and Wisconsin. But the courts of Illinois, Rhode Island, and Georgia, have taken an opposite view. In Attorney General ex rel. Coneley v. Common Council[30] the Supreme Court of Michigan declared unconstitutional such a statute passed in July, 1889, on the ground that it would disfranchise persons necessarily absent from the city on the date fixed by the act for registration and those moving from one ward to another between that date and election. The court says:

"These authorities all tend in one direction. They hold that the legislature has a right to reasonably regulate the right of suffrage, as to the manner and time and place of voting, and to provide all necessary and reasonable rules to establish and ascertain by proper proof the right to vote of any person offering his ballot, but has no power to restrain or abridge the right, or unnecessarily to impede its free exercise. This law before us disfranchises every person too ill to attend the board of registration, and unreasonably and unnecessarily requires persons whose business duties, public or private, are outside of Detroit, to

[28] Morris v. Powell, 125 Ind. 281.

[29] 22 Nebr. 265.

[30] 78 Mich. 545.

return home to register as well as to vote, making two trips when only one ought to be required. In my opinion, no registry law is valid which deprives an elector of his constitutional right to vote by any regulation with which it is impossible for him to comply. No elector can lose his right to vote, the highest exercise of the freeman's will, except by his own fault or negligence. If the legislature, under the pretext of regulation, can destroy this constitutional right by annexing an additional qualification as to the number of days such voter must reside within a precinct before he can vote therein, or any other requisite, in direct opposition to any of the constitutional requirements, then it can as well require of the elector entirely new qualifications, independent of the Constitution, before the right of suffrage can be exercised. If the exigencies of the times are such, which I do not believe, that a fair and honest election cannot be held in Detroit, or in any other place in our state, without other qualifications and restrictions upon both native-born and naturalized citizens than those now found in or authorized by the Constitution, then the remedy is with the people to alter such Constitution by the lawful methods pointed out and permitted by that instrument."

14. **Minority representation and cumulative voting.**—In order to give the minority representation in legislatures and on administrative boards a number of devices have been resorted to, but the difficulty can hardly be considered as having been satisfactorily solved. Unless provision is made in the state constitution, it is not certain that the legislature has the power. The Supreme Court of Ohio in State v. Constantine[31] held unconstitutional a statute pro-

[31] 42 Ohio St. 437.

viding that an elector might vote for a portion only of several officers to be elected. The reasons for adjudging this statute void were thus stated by the court: "No such thing as 'minority representation' or 'cumulative voting' was known in the policy of this state at the time of the adoption of this constitution in 1851. The right of each office to be filled at an election had never been doubted. No effort was made by the framers of the constitution to modify this right; and we think it was intended to continue and guaranty such right, by the provision that 'each elector shall be entitled to vote at all elections.' Such right is denied by this statute, which provides for the election of four members of the board of police commissioners, but denies to any elector the right to vote for more than two persons for such commissioners."

Also in Maynard v. Board of Canvassers[32] the Supreme Court of Michigan held unconstitutional a statute providing that "in all elections of representatives to the state legislature in districts where more than one is to be elected, each qualified elector may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same among the candidates as he may see fit, and the candidates highest in votes shall be declared elected"; i. e., a statute providing for cumulative voting, a practice very common in elections of directors of private corporations. After reviewing the restrictive, cumulative, Geneva, and Hare, plans for minority representation the court, speaking through Chief

[32] 84 Mich. 228.

Justice Champlin, makes the following clear and concise statement:

"There is in my mind no doubt that the act under consideration is unconstitutional. The Constitution is the outgrowth of a desire of the people for a representative form of government. The foundation of such a system of government is, and always has been, unless the people have otherwise signified by their Constitution, that every elector entitled to cast his ballot stands upon a complete political equality with every other elector, and that the majority or plurality of votes cast for any person or measure must prevail. All free representative governments rest on this, and there is no other way in which a free government may be carried on and maintained. That the majority must rule, lies at the root of the system of a republican form of government no less than it does in a democratic. When there are more than two candidates for the same office placed in nomination, it may often happen that one candidate, although he may receive more votes than any other, may not receive a majority of the votes cast. Still the principle of majority rule is preserved, for in such case more of the electors prefer such candidate than they do any other particular candidate to represent them. It is the constitutional right of every elector, in voting for any person to represent him in the legislature, to express his will by his ballot; and such vote shall be of as much influence or weight in the result, as to any candidate voted for, as the ballot and vote of any other elector. The Constitution does not contemplate, but by implication forbids, any elector to cast more than one vote for any candidate for any office. This prohibition is implied from the system of representative government provided for."[33]

[33] Maynard v. Board of Canvassers, supra.

15. **Majority and plurality.**—In the absence of constitutional or statutory provisions that a candidate shall receive an actual majority of votes cast at the election for candidates for the office for which he is running, when there are more than two candidates, the one receiving the highest number of legal votes is elected. In other words the term "majority" is not infrequently used in the same sense as "plurality." Though an absolute majority, i. e., more than half of those eligible to vote, may be required to pass amendments to the Constitution, the term "majority" will not be so interpreted with respect to officers unless expressly required in the Constitution or statutes. As said by Chief Justice Waite in Cass County v. Johnston:[34] "All qualified voters, who absent themselves from an election duly called, are presumed to assent to the expressed will of the majority of those voting, unless the law providing for the election otherwise declares. Any other rule would be productive of the greatest inconvenience, and ought not to be adopted, unless the legislative will to that effect is clearly expressed." When two or more officers of the same designation are to be chosen at a given election, a like number of persons voted for standing highest on the lists will be declared elected.[35]

16. **The ballot.**—The kind of ballot that shall be used is a matter for the legislature to determine.[36] The propaganda now going on in favor of the short

[34] 95 U. S. 360.
[35] Cooley Const. Lim. (5th ed.), 779.
[36] Ransom v. Black, 54 N. J. L. 446.

ballot is one which should be directed to the legislatures, unless thought of sufficient importance to be placed in the constitutions. As state constitutions are already, as a rule, too long and cumbersome because too much matter is crowded into them which belongs in the statutes, it would hardly seem expedient further to encumber constitutions with amendments reducing the number of elective offices. Where the statute requires that the ballot be of a particular color, it has been held that this requirement is substantially complied with when all ballots used at the same voting place are of the same color. In the case of Boyd v. Mills,[37] the election was contested on the ground that in a given precinct yellow ballots were used, whereas the statute required white ones, and the throwing out of this precinct would affect the result of the election. The court, speaking through Justice Allen, says:

"Without proceeding to review at greater length the authorities cited by counsel on both sides of the question, we conclude that the mere fact that the paper on which all the ballots used in one election district was of a color other than white, where the ballots were not only printed by the authorities designated by law, and by them furnished to the judges of election, but were furnished by the judges to the voters, and were the only ballots furnished to or used by any voter at that voting place, is not sufficient to prevent the counting of the votes. The secrecy of the ballot has been in no wise impaired; the voters themselves have manifested no disposition to disregard the law, and it may be fairly inferred that the

[37] 53 Kan. 594.

use of the colored ballots was an honest mistake on the part of the judges of the election. Had a part of the ballots been white and a part colored, so as to afford some grounds for identification of the votes cast by the individual voters, a different question would be presented. We reach the conclusion that the law has not been substantially infringed, because we are unable to see how the purposes of the act can have been impaired in any degree by the mistake made in using the colored ballots. By this decision we do not intend to say that any of the provisions of the law may be disregarded, or that any officer may escape liability to punishment for violating any of its provisions."

17. **Assistance to voters.**—Where an educational qualification is not a prerequisite to voting, the statutes may and should provide for the rendering of assistance to illiterate voters. In order to avoid corruption, assistance by others than election officials should be forbidden, but it is a travesty to expect a man who cannot read to mark his ballot without assistance. It therefore follows that if such are to be allowed to vote, the proceeding should be relieved of the character of a gambling operation by furnishing them official assistance. The high percentage of voters in our large cities who cannot read English makes this a question of practical, rather than one of merely academic, importance. The throwing out of ballots not properly marked is not a sufficient safeguard. The ballot may, by accident, be marked so that it is a legal ballot and yet not express the will of the voter, and unless it does, the election becomes, to that extent, a farce. An election purports to be

a means of giving expression to the popular will and should be so conducted that it will come as near to doing this as possible.

18. **Canvassing of votes.**—When the votes are all cast there remains the task of counting them, nor is this a mere mechanical task, for the ballots are not like so many apples, each necessarily amounting to one in the count. But as the validity of each ballot must be passed upon in order to determine whether or not it should be counted, the work of a board of canvassers becomes a quasi-judicial function. Their finding is prima facie evidence of the title to office of the one whom they declare to be elected. But it is only prima facie evidence and to hold it conclusive would be putting a dangerous power into the hands of a board which is not infrequently so made up that it can be swayed by partisan considerations. The will of the voters ought not to be subjected to the danger of being defeated by the findings of such a board. Their findings are less likely to be partisan if their decision is subject to review. In the last analysis the court may go behind the decision of the board of canvassers to the ballots themselves and may even go behind the ballots to the voter if necessary to do so in order to find out what the ballot really means.[38] In the case of the People v. Vail[39] the court said: "The decision of the canvassers was conclusive in every form in which the question arises, except that of a direct proceeding by quo warranto, to try the right. But, to hold it conclusive in this proceeding

[38] People ex rel. Yates v. Ferguson, 8 Cow. 102 (N. Y.).
[39] 20 Wend. 12 (N. Y.).

would be nothing less than saying that the will of the electors plainly expressed in the forms prescribed by law may be utterly defeated by the negligence, mistake, or fraud of those who are appointed to register the results of an election."

19. **How to compel canvassing board to act.**—The work of a canvassing board, though in a sense judicial, is not altogether so. Though the decision of a dispute one way rather than another is a discretionary act, whether or not it will decide at all is not discretionary. Their duty to act is a ministerial duty and may be compelled by mandamus. Not only is this true in the first instance, but if a recount is deemed necessary by the court, under these circumstances the canvassing board may be compelled by mandamus to act. As said by Justice Brewer in Lewis v. Commissioners:[40] "It is settled by abundant authority that where the board refuses to canvass any of the votes it may be compelled so to do by mandamus, and this though the board has adjourned *sine die*. The canvass is a ministerial act, and part performance is no more a discharge of the duty enjoined than no performance. And a candidate has as much right to insist upon a canvass of all the returns as he has of any part, and may be prejudiced as much by a partial as by a total failure. The adjournment of the board does not deprive the court of the power to compel it to act, any more than the adjournment of the term of a district court would prevent this court from compelling by mandamus the signing of a bill of exceptions by the judge of that

[40] 16 Kan. 102.

court, which has been tendered to him before the adjournment."

20. **What constitutes an election.**—In order that an election may be binding, i. e., may have legal effect, it must be called in accordance with law by the proper authority to call such an election and it must be conducted in accordance with law by the proper officers. As these matters are regulated by statute this is another way of saying that elections, in order to be regular and legal, must conform to statutory requirements. Of course, if the people see fit to take this power from the legislature they may do so by inserting provisions in the state constitution similar to provisions in the Federal Constitution which govern in the election of President and Vice-President of the United States.

Whether or not there has been a sufficiently substantial compliance with the law to constitute a bona fide election, as well as what is the actual result of an election, must ultimately be settled by the court. Most commonly a plurality rather than a majority of the votes cast is sufficient to decide an election, unless there is a provision to the contrary. Where there are several running for the same office this would mean that a candidate may be elected who has received but a minority of all the votes cast at that election, for the office for which he was a candidate. It may even happen that where there are but two candidates for the same office one may be elected who has received neither a majority or a plurality of the ballots which were cast for candidates for that office. This is admitted by the court in the case of

People ex rel. Furman v. Clute.[41] In this case Furman received but a minority of the votes cast, but Clute, who received a majority, was ineligible to the office by reason of his holding another office. But there was not sufficient proof that the voters knew that he held the other office, so that they could not be said to be intentionally throwing their votes away by casting them for one whom they knew to be ineligible. Under these circumstances the court considered that there had been no election. The rule governing such cases is thus stated by the court: "The existence of the fact which disqualifies, and of the law which makes the fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector as that to give his vote therewith indicates an intent to waste it. The knowledge must be such, or the notice brought so home as to imply a willfulness in acting, when the action is in opposition to the natural impulse to save the vote and make it effectual. He must act so in defiance of both law and fact, and so in opposition to his own better knowledge that he has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied."

21. **Advantages and disadvantages of elections.**— Though a popular election is a slow, cumbersome and expensive method of choosing public officers, it has certain decided advantages. It is educative and gives the common people a share in government which they could not exercise effectively in any other way. As a rule the sense of responsibility which a public of-

[41] 50 N. Y. 451, Leading Illustrative Cases.

ficer feels toward the people is greater where he owes his official position to them, and this sense is keener where he owes it directly rather than indirectly. It is a recognition of this fact that has brought about a change in the method of electing United States senators. Here the urgency and determination were so great that it was practically effected in many states without waiting for a change in legal forms.

The degree of advantage resulting from popular election depends measurably upon the character of office to be filled as well as upon the degree of knowledge which the average voter has of what may be reasonably expected of the officer. It must be admitted that with reference to certain classes of officers this method of selection has its limitations. While most agree that legislators should be chosen by election rather than by appointment, with regard to judges there is room for honest difference of opinion, and as regards experts such as engineers or chemists, about whose duties or qualifications the average voter cannot be expected to have much knowledge, it is pretty generally agreed that appointment is the preferable method of selection. It may be that in this country the method of choosing officers by popular election has been extended somewhat beyond its natural limits, but with reference to this as with reference to all matters of government, the final test is its practical working. If it works well, its conformity or lack of conformity to theory is not a vital matter. Results are the touchstone for testing governmental machinery. If experiment shows that

for a given people a certain system works well, it has justified itself for that people, however miserably it may have failed when tried by other people.

22. **Appointment to office.**—Since the method of selecting public officers by appointment is now and will continue to be a matter of more than academic importance, it is necessary that the law governing it be considered. This law is to be found partly in our constitutions and partly in our statutes. The Constitution of the United States confers upon the President a very large power of appointment. In Art. II, § 2, we find this provision: "He shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." The state constitutions usually grant to the governor a much more limited power of appointment; indeed, unless it is specifically conferred he has no power of appointment, as he may not exercise it as a residuary power, for as decided by the Supreme Court of Illinois, in Field v. The People,[42] the legislature is the sole possessor of residuary powers—the governor having merely such powers as are delegated to him.

23. **Nature of the power to appoint.**—While the power to appoint to office is primarily an executive

[42] 3 Ill. 79.

function, it is exercised to a limited extent by the legislative and the judicial branches of the government. The Constitution of the United States provides in Art. I, §2, Clause 5: "The House of Representatives shall choose their speaker and other officers." These other officers may, of course, be chosen by appointment as well as by election. When by appointment the speaker exercises the appointing power. Section 3, Clause 5, says: "The Senate shall choose their other officers, and also a President *pro tempore* (for the time) in the absence of the Vice-President, or when he shall exercise the office of President of the United States." Though the Constitution does not contain a similar provision with regard to the courts, they are given the power by statute. Both the supreme and inferior courts appoint their clerks and bailiffs, but not their marshals. The rule as to appointment of clerks and bailiffs by the judges is pretty generally, if not universally, followed in the state courts. This limited exercise of an executive function by the legislature and courts is not a sufficient infraction of the principle of separation of powers to cause any considerable demoralization in the system of government, and furthermore it is a matter of practical convenience to judges to be able to select for themselves the men with whom they will have to work, and between whom and them the relations are more or less of a personal and confidential nature.

24. **Exercise of power compulsory.**—Though the choosing between two or more persons eligible to appointment is a discretionary function, where the

power to appoint exists, the exercise of it is ministerial and may be compelled by mandamus. For, while it is necessary, in order that the power of appointment may be something more than a mere name, that the one exercising it shall have some power of choice between candidates, it is also necessary that the public service shall not be allowed to suffer merely because one having the power of appointment is, for any reason, disinclined to perform his duty.

The necessity of allowing some discretion to the appointing power is well stated by the Court of Appeals of New York, in the case of People ex rel. Balcom v. Mosher et al.[43] This is a case in which the constitutionality of the civil service law requiring the appointment of the applicant standing highest on the list, was questioned. The court says:

"If the civil service commissioners have power to certify to the appointing officers only one applicant of several who are eligible and whom they have, by their own methods, ascertained to be fitted for a particular position, and their decision is final, or if where more are certified the one graded highest must be appointed, then the civil service commission becomes and is the actual appointing power. To reach such a result, however, it must be held that the word 'appointment' as used in the Constitution is not to be given its usual and ordinary meaning, but may be so limited and restricted as to leave in the local authorities a mere ministerial duty, with no discretion, nor choice, nor responsibility in respect to the person to be appointed. Such a construction would

[43] 163 N. Y. 32.

completely nullify the provision of the Constitution which confers the power of appointing city officers upon the local authorities of the municipality. A fair reading of the Constitution leads to no such result."

The court then quotes with approval from the United States Attorney-General as follows:

"If to appoint is merely to do a formal act, that is, merely to authenticate a selection not made by the appointing power, then there is no constitutional objection to the designation of officers by a competitive examination, or any other mode of selection which Congress may prescribe or authorize. But if appointment implies an exercise of judgment and will, the officer must be selected according to the judgment and will of the person or body in whom the appointing power is vested by the Constitution, and a mode of selection which gives no room for the exercise of that judgment and will is inadmissible. If the President in appointing a marshal, if the Senate in appointing its secretary, if a court or head of a department in appointing a clerk, must take the individual whom the civil service board adjudge to have proved himself the fittest by the test of a competitive examination, the will and judgment which determine that appointment are not the will and judgment of the President, of the Senate, of the court, or of the head of the department, but are the will and judgment of the civil service board, and that board is virtually the appointing power."

25. **Form of appointment.**—The courts hold that an oral appointment is not sufficient. The reason for this rests in no mere technical rule of law. It would lead to no end of confusion if several per-

sons might contest the right to exercise the duties of an office, each claiming title upon the basis of a verbal appointment by the appointing power. Verbal statements are too easily misunderstood, misinterpreted, or forgotten, to form any adequate basis for laying claim to an office the functions of which are of vital importance to the public. In other words, the state has too great an interest in the prompt performance of official duties to risk the confusion and delay which might result from a multiplication of contests for office, and especially if such uncertainty and confusion may be avoided by the exercise of reasonable precautions upon the part of the appointing power. Nor can it be said that the requiring of written evidence of the appointment is an unreasonable requirement either as regards the appointing power or the claimant. This is true whether the act of the appointing officer is final or needs ratification, although in the latter case the absence of written evidence would not be productive of so much mischief, as it could be much more easily corrected. If there is sufficient reason for enacting the Statute of Frauds requiring written evidence of transactions between private individuals which do not affect the public except remotely, there is much stronger reason for requiring written evidence of acts which affect the public directly.

In discussing this question the Court of Appeals of New York says in People ex rel. Babcock v. Murray:[44] "There is no color in the opinion, or in the statutes of this state, or any custom or usage of which

[44] 70 N. Y. 521.

we have knowledge, for claiming that an appointment to any civil office can be made verbally or without a proper writing evidencing the fact." The only exception we know to this rule is that of an oral appointment in open court. Here the reason for the rule does not hold and consequently the rule can be safely modified.

26. **The commission.**—So long as there is evidence in writing of the appointment, the courts do not insist that this writing shall be in any particular form, unless a particular form has been made necessary by statute. This writing is commonly called a commission and usually given under seal. The latter is not, however, unless made so by statute, a prerequisite to the validity of the commission. In general, any form of writing which shows clearly an intent on the part of the proper authority to appoint a certain individual to a given office for which he is eligible, constitutes a sufficient commission. The signature of the appointing power is, of course, necessary. As said by the court in the case of Babcock v. Murray, above: "The signing of the commission is an integral part of the duty of the delegated power and necessary to a perfect and complete execution of the power entitling the appointee to assume the duties of the office."

27. **When appointment is complete.**—Appointment is inchoate until the last act to be performed by the appointing power is completed. This act is the signing of the writing or commission. The appointing power has then committed itself by an unequivocal act, the effect of which is a matter for interpre-

tation and enforcement by the courts. The leading case upon this question is that of Marbury v. Madison.[45] This case was an action for a mandamus to compel the Secretary of State to deliver a commission signed by President Adams appointing Marbury a justice of the peace. The Supreme Court of the United States, speaking through Chief Justice Marshall, says: "Some point of time must be taken when the power of the executive over an officer not removable at his will must cease; that point of time must be when the constitutional power of appointment has been exercised; when the last act required from the person possessing the power has been performed. The last act is the signature of the commission. The time for deliberation has then passed. He has decided. His judgment has been made and the officer is appointed."

28. **Title to office determined by quo warranto.**— Where a question arises as to the title of an officer to his office his right is determined by a quo warranto proceeding unless the statutes have provided some other method. The granting of this writ rests in the sound discretion of the court, if the application is by a private person;[46] but if the application is by the attorney general the court has no discretion, unless otherwise provided by statute.[47] Where the application is made by a private person he must show that he has some interest in the question to be decided; but it has been held that the interest which a tax-

[45] 1 Cranch 137 (U. S.), LEADING ILLUSTRATIVE CASES.
[46] Commonwealth v. Jones, 12 Pa. St. 365.
[47] Commonwealth v. Allen, 128 Mass. 308.

payer has in the due administration of public affairs is sufficient, if he is merely asking to have the one ousted who is unlawfully holding the office.[48] But if the relator is seeking to put himself into the office from which he is asking that another be ousted, he must, in order to entitle him to the writ, show that he has, prima facie, a better title.[49] It must also appear that the controversy relates to the title to a public office and not to a mere employment.[50] Again it must appear further that the alleged usurper has or has had actual possession and user of the office, a mere claim by him is not a sufficient basis. But, if he has been in possession, his abandonment of it will not defeat the issuance of the writ.[51]

[48] Commonwealth v. Meeser, 44 Pa. St. 341.
[49] People v. Rynders, 12 Wend. 425 (N. Y.).
[50] People v. Hills, 1 Lans. 202 (N. Y.).
[51] State v. Graham, 13 Kan. 136.

CHAPTER III.

POWER TO FILL VACANCIES.

29. **Elective offices.**—As the process of selecting a public officer is by popular election or by bodies not always in a position to act promptly, and as it is desirable to avoid an interregnum so that the public business may not suffer by reason of there being no one duly authorized to perform the duties of a given office, provision is made for filling vacancies in elective offices by appointment. This appointment is only temporary and lasts only until the emergency is over, i. e., until it is practicable to hold an election. Where the body having the power to elect has had an opportunity to fill the vacancy but has failed to do so, there is a difference of opinion as to the effect of such action. The United States Senate has adopted the policy of interpreting this to mean that a failure to elect where there has been an opportunity is equivalent to an expression of the will of such body that the office continue vacant. Hence, where a state legislature has had an opportunity to elect someone to fill a vacancy in the United States Senate, but has failed to do so either because of a deadlock or for whatever reason, the Senate will not seat one appointed by the governor to fill such vacancy. The cases of W. A. Clark, of Montana, and M. S. Quay, of Pennsylvania, are, perhaps, the best known cases followed as prece-

dents by the Senate. The same view is not, however, followed by all the states, in the case of state officers. The governor is allowed to fill a vacancy even though the legislature has, by its action, expressed itself in favor of having the vacancy continue.

30. **When a vacancy happens.**—The Constitution of the United States provides: "The President shall have power to fill all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session." The constitution of New Jersey contains a similar provision. Mr. Sanderson, judge of Hunterdon Pleas, died while the senate was in session. The governor nominated Mr. Kuhl as his successor and the senate refused to ratify the nomination, thus leaving the office vacant. During the recess of the legislature, the governor appointed Mr. Kuhl to fill the vacancy. An action was brought to determine the legality of this appointment by the governor. The decision turned upon the interpretation of the word "happen." It was admitted that if "happen" meant to "take place, arise, or originate," the vacancy could not be filled by the governor because it did not arise during the recess of the legislature. If, upon the other hand, it meant to "exist," the governor would have the power to fill it. The court decided that while the first seemed most accordant with the letter of the Constitution, the latter was most accordant with its reason and spirit. It therefore decided in favor of the governor's appointee.[52]

[52] Fritts v. Kuhl, 51 N. J. L. 191.

31. **Anticipatory vacancies.**—In order that the appointing power may fill a vacancy it must be one which begins before the term of office of the one making the appointment expires. It is of no consequence that if no appointment is made a vacancy will be sure to exist. In other words, the appointing power may not anticipate a vacancy which will arise in the future but not until after the term of office of the one making the appointment has expired. This rule is well illustrated by the case of People ex rel. Sweet v. Ward.[53] The facts were briefly these: Ward was the duly elected district attorney of San Diego County for the term commencing January 2, 1893, to serve until January 7, 1895, or until his successor was duly qualified. He qualified and entered upon the discharge of the duties of the office. In the November preceding the expiration of Ward's term, William Darby was elected to succeed him. Darby duly qualified on November 24, and died December 15 of the same year. Ward's term of office would expire on January 7, 1895. On the 2nd day of January of that year the board of supervisors, of whom the terms of two would expire on January 7, 1895, met and appointed Ward to be district attorney "for the term of office to be taken at 12 M. on the seventh day of January, 1895." On the day of his appointment, Ward qualified in due form as the appointee to succeed Darby. At 3 P. M. on January 7, 1895, the new board declared a vacancy to exist in the office of district attorney and appointed Sweet to fill the same for the term for which Darby had been elected, and

[53] 107 Cal. 236.

Sweet in due course qualified, made demand upon Ward for the office and upon his refusal brought quo warranto proceedings. The court decided in his favor on the ground that "the board could, by its action, neither create a vacancy, nor by anticipation, fill one, which was to arise *in futuro* during the term of its successor." In support of this conclusion they quote from Mechem on Public Offices, § 133: "The appointing power cannot forestall the rights and prerogatives of their own successors by appointing successors to offices expiring after their power to appoint has itself expired."

CHAPTER IV.

ACCEPTANCE AND ELIGIBILITY.

32. **Acceptance of office.**—Whether one is chosen to public office by election or by appointment, his title is not complete and unquestioned until he accepts and qualifies. Acceptance may be presumed from the fact of entering upon the duties of the office or it may be formal by speech or letter of acceptance as is done in the case of nominations, although the acceptance of a nomination is not the acceptance of an office.[54] The best evidence of acceptance is legally qualifying for the office, for this leaves no room for doubt as to the intention to accept or the fact of acceptance.

33. **Is acceptance compulsory?**—Although in England there are numerous decisions holding that acceptance of office is not voluntary but compulsory, the rule cannot be regarded as so well established in this country. In theory there is no convincing reason why, if the state has the right to compel its citizens to serve in the army, it may not also, if deemed necessary, compel them to serve in civil offices, because if not it may be unable to perform the duties which as a state it is under obligation to perform. The question would seem to be whether or not it is expedient for the state to enforce such a rule, rather than a question as to the right of the state to adopt and enforce such a rule, provided that in its judgment such

[54] Smith v. Moore, 90 Ind. 294.

a rule is necessary. Though a provision in the Constitution compelling acceptance of office would remove all doubt, in the absence of such a provision, it would seem that the legislature has the power to compel acceptance, and that the courts may enforce it as a common law obligation.

The leading American case on this point is People ex rel. Ins. Co. v. Williams.[55] In this case a mandamus was sought to compel Thomas C. Williams to accept and perform the duties of the office of town clerk in the town of Mount Morris, County of Ogle, Illinois. There was no question that Mr. Williams possessed the requisite qualifications, or that he had been legally elected. The constitution and statutes of Illinois were silent, except that the statutes provided a penalty for refusing to serve, and it was argued by the respondent that this remedy was exclusive, but the court did not take this view. Insisting that the duty to serve was a common law obligation which the court could enforce, it granted the writ of mandamus. The court says: "It is essential to the public welfare, necessary to the preservation of government, that public affairs be properly administered; and for this purpose civil officers are chosen and their duties prescribed by law. A political organization must necessarily be defective, which provides no adequate means to compel the observance of the obvious duty of the citizen, chosen to office, to enter upon and discharge the duty imposed by its laws and necessary to the exercise of the functions of government."

[55] 145 Ill. 573, Leading Illustrative Cases.

34. **Who are eligible to office.**—If those must serve who are drafted and eligible, it becomes necessary to inquire who are eligible. The eligibility of some few is fixed by the Constitution of the United States. With regard to the President it fixes the tests of age, nationality and residence, the provision being as follows: "No person except a natural born citizen, or a citizen of the United States at the time of the adoption of the Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained the age of thirty-five years, and been fourteen years a resident of the United States."[56] Although no case has ever forced a decision of the question, it is generally argued that a child born abroad but subject to the jurisdiction of the United States, as would be the case of the child born abroad to an American diplomatic or consular officer, would be eligible to the office of President. As the Vice-President may at any time succeed to the duties of the Presidency, the requirements as to his eligibility are the same. The Constitution fixes also the qualifications as to age and residence of Congressmen and Senators.

The provisions fixing the qualifications of some few of the more important state officers are found in the state constitutions, but the qualifications of by far the greater number of officers are to be found in the statutes. Where the constitutions have provided specific qualifications these may of course not be varied by the statutes, but if the qualifications provided in the constitutions are merely general, as that no one

[56] Art. II, § 5.

shall be entitled to hold office who is not an elector, the statutes may in such cases provide additional qualifications.[57]

Whether the officer must be eligible at the time he is chosen, or it is sufficient that he be eligible at the time he is to enter upon the duties of his office, is a question about which there is a difference of opinion, the more common view being that eligibility means "capacity to be chosen" and hence that the time at which the test is to be applied is the date of election or appointment. While the majority of cases so hold, this does not seem to be the more logical view. What would seem to be the purpose of the legal requirements is to provide that no one not qualified should be exercising the duties of an officer. This would logically mean fitness at the time he is actually exercising the duties of the office and not at some time in the past when he was not exercising or attempting to exercise the duties of the office. This reasoning applies to disqualifications which are fully within the power of the candidate to remove by the time his term of office is to begin, and would not apply to a property qualification which he might not be able to satisfy by the time he is to enter upon the duties of the office. Where a given age is required, but the statute does not say expressly that "no one shall be elected to the office who shall not have attained the age of—years," it is sufficient that the officer shall have attained that age at the beginning of his term. The holding of an incompatible office at the time of election should not disqualify the candidate if there

[57] Barker v. People, 3 Cow. 686 (N. Y.).

is an intent to resign that office and accept the one for which he is running.

The leading case upon this point is that of Smith v. Moore,[58] the main facts in which are: In the general election Nov. 7, 1882, Smith, Moore and Finly were candidates for the office of treasurer of Benton County for the term of two years commencing Aug. 15, 1883. Smith received a majority of all votes cast and had a certificate from the board of canvassers to that effect, but he had been elected justice of the peace for a term of four years commencing Nov. 29, 1878, was duly commissioned, qualified and was discharging the duties of his office at the time of the general election of Nov. 7, 1882. The court held that this did not render him ineligible to election to the office of treasurer, notwithstanding the fact that the Indiana constitution provided that "no person elected to any judicial office shall, during the term for which he shall have been elected, be eligible to any office of profit or trust under the state, other than a judicial office." It decided further, overruling the court below, that his re-election to the office of justice of the peace in April, 1882, which he refused, on Nov. 27, 1882, to accept, did not disqualify him for the office of treasurer. The court says:

"When appellant entered upon his term as justice of the peace, on the 29th day of November, 1878, he became, during the continuance of that term, disqualified to hold and perform the duties of any public office, except a judicial one. But while he could not, during that term, hold or perform the duties of a public office, other than judicial, it does not follow

[58] 90 Ind. 294.

that he might not, during that term, be legally voted for and chosen to an office, the term of which would not begin until after the expiration of the judicial term as justice. Suppose that the judicial term had ended on the 8th day of November, 1882, * * * could it be said with reason that appellant might not have been voted for and legally chosen to the office of county treasurer for a term to begin in August, 1883? If so, then the office of justice of the peace disqualified him from holding and performing the duties of that office, not only during the term for which he was elected a justice of the peace, but for almost two years after the expiration of that term. Such a construction would make the Constitution read that no person elected a justice of the peace shall, during the term for which he shall have been elected, be eligible to be voted for for any office, except a judicial one. Such a construction, we think, is not compatible with sound reason nor a proper interpretation of the Constitution."

35. **Age qualification.**—It is a common law rule that for offices requiring discretion, and not simply involving ministerial duties, one to be eligible must have attained his majority. A number of our constitutions provide that in order to be qualified to hold office one must be an elector, and where it is not found in the constitution it may be provided by statute. This means that the candidate must be at least twenty-one years of age, and for the higher offices a higher limit is fixed, as for President of the United States, Senators, Congressmen, governors, etc. Not only is a minimum age limit fixed, but in many cases a maximum limit as well. This is more common in the case of judges than other officers and is usually

seventy years. Though minor judicial officers such as surrogates and justices of the peace are not included in a general provision of this sort as to judicial officers, county judges are.[59] The federal statutes make provision for retiring justices of the supreme court at the age of seventy, but does not make retirement at that age compulsory.

36. **Citizenship as a qualification.**—Though generally required by either the constitution or statutes, and implied in the case of elective offices, citizenship is not in all cases necessarily implied.[60] The election laws of a number of the states permit men to vote who are not citizens of the United States, and these men may, in the absence of statutes, fill minor federal offices; but where the statutes make citizenship a qualification this requirement must be met. If, in addition to citizenship, residence is required, this condition must be complied with in order to render one eligible.[61] What constitutes United States citizenship is defined in the Fourteenth Amendment to the Constitution and citizenship in the various states is defined either in their constitutions or statutes. Residence is sometimes defined in the statutes and sometimes left to the courts to decide according to their own rules of interpretation.

37. **Sex as a qualification.**—Since the adoption of the Nineteenth Amendment to the Federal Constitution, which provides that the right to vote shall not be denied or abridged on account of sex, the question has arisen as to whether this Amendment has made women eligible for public office. The answer to the

[59] People v. Brundage, 78 N. Y. 403.

[60] State v. Wilson, 29 Ohio St. 347.

[61] Paterson v. Miller, 2 Metc. 493 (Ky.).

question depends upon the constitution and statutes of each state. In many states, either by the constitution or by statute, eligibility for office is confined to those eligible to vote, and it has been asserted by eminent authorities that the one right necessarily depends upon the other.

The opinion has been expressed that the Amendment relates only to voting, and that the states are still free to determine, in their constitutions and statutes, who may hold office. As these constitutions and statutes stood prior to 1920, office holding was by many confined to "males" and "electors." Construing the latter word in the sense in which it was understood at the time it was used, the court would probably hold that it means "male" electors. Under such an interpretation, statutory and constitutional changes would be necessary to make women generally eligible for office. Such changes were made in some states, even prior to 1920, and in these states women may hold office. It is very doubtful whether the Nineteenth Amendment by its own force makes women eligible for office. It has been said that conferring suffrage on women makes them eligible to hold office. But in England it has been held that a woman is not eligible even for an office for which she can vote. The question of eligibility must be determined by a careful study of the constitution and statutes of each state. Where the constitution restricts office holding to males, the legislature is incompetent to extend capacity to women. A constitutional amendment would be necessary. Where, however, the constitution contains no express or implied restrictions, the legislature may

determine who is eligible for office. In a number of states such eligibility has been created.[62]

Apart from recent constitutional and statutory changes in certain states, the view has been quite generally expressed that, under common law principles, women are ineligible for public office.

A few interesting instances of female officials can be found in the history of mediaeval England, but the disputes which came into court usually involved the right to succeed to a hereditary office.

"A distinction should be made between true public offices and positions of a merely ministerial nature: women are eligible for the latter. The law seems, moreover, more liberal towards women's being in appointive than in elective offices, and in offices exercisable through a deputy than in those demanding personal attention. While the courts have sometimes said that delicacy of a woman's natural unfitness for executive duties is the reason for barring her, these arguments never appear to have been considered with much seriousness. It has also been argued that the change in the social and economic position of woman should change her political status. But the question is not one of public policy, and the decisions do not seem to have been influenced by the judges' personal opinions on the desirability of administration by women. The sole issue should be whether the sovereign has given women any such political power. In spite of occasional tenure of obscure offices by women in England, the practically uninterrupted usage to the contrary, acquiesced in for centuries, would seem to settle the common law. And although the exclusive use of masculine pronouns in the constitutions in this country has never been regarded as excluding women, there has been little

[62] Rose v. Sullivan, 185 Pac. 562 (Mont.), (Office of county auditor); Reed v. Hammond, 123 Pac. 346 (Cal.); State ex rel. Jordan v. Quible, 86 Nebr. 417, (Office of county treasurer).

tendency to construe general provisions in their favor."[63]

As to whether women are eligible to serve on juries, the cases are conflicting.

38. **Property qualifications.**—Though the Federal Constitution provides no property qualification for the holding of office and very few of our state constitutions provide any, such qualification may in the absence of constitutional inhibitions be required by statute, as is done in several states. In State ex rel. Thompson v. McAllister[64] a statute requiring councilmen to be freeholders was held constitutional. The Constitution merely provides that "no person except a citizen entitled to vote shall be elected or appointed to any office, state, county or municipal." The court did not consider this as providing that all electors would be eligible to hold office, as was contended by counsel. It quotes with approval the language of the Supreme Court of Colorado, in Darrow v. People,[65] construing a similar constitutional provision: "The right to vote and the right to hold office must not be confused. Citizenship and the requisite sex, age and residence constitute the individual a legal voter, but other qualifications are absolutely essential to the efficient performance of the duties connected with almost every office; and certainly no doubtful implication should be favored for the purpose of denying the right to demand such additional qualifications as the nature of the particular office may reasonably require. We do not believe that the framers of the Constitu-

[63] 28 Harv. L. Rev. 140.
[64] 38 W. Va. 485.
[65] 8 Colo. 426.

tion by this provision intended to say that the right to vote should be the sole and exclusive test of eligibility to all civil offices, except as otherwise provided in the instrument itself; that no additional qualification should ever be demanded and no other disqualifications should be imposed."

Where property qualifications are required as a prerequisite to the right to hold office, it is upon the theory that the ownership of property in a community is evidence of an attachment to and interest in that community and that this will serve to make one a more zealous and efficient officer. It is not for the purpose of fostering class distinctions. It tends to guarantee greater conservatism among public officers, which of course has its advantages and disadvantages, and on which side the balance will fall depends upon the type of mind striking the balance.

39. **Educational qualifications.**—Although no test is absolutely accurate for the purpose of determining in advance who will make an efficient public officer, educational qualifications constitute a more logical test for determining one's fitness to perform the duties of a public office than do property qualifications. A civil service examination will sift out those who are absolutely incapable of performing the duties of an office, while a property qualification will leave many of them in. To the mind of the ultra conservative the educational test is not as desirable as the property test. The power of the legislature to impose it is, however, the same. In State v. Covington,[66] the court in interpreting a provision of the Consti-

[66] 29 Ohio St. 102.

tution that "no person shall be elected or appointed to office in this state unless he possesses the qualifications of an elector," laid down the rule that such a provision "does not by implication forbid the legislature to require other reasonable qualifications for office," and held that the legislature might provide that the ability to read and write should be a qualification for holding office.

40. **Religious qualifications.**—Our constitutions, practically without exception, forbid religious "tests" as a qualification for holding civil office. In the face of such provisions a statute providing any qualification which the courts would interpret as a religious test would be declared null and void. A provision requiring an oath of office is not repugnant to provisions in constitutions against religious tests.

41. **Loss of qualifications.**—The possession of the necessary qualifications by a public officer at the beginning of his term does not of course insure that these qualifications will continue until the end of his term. Where good moral character is a necessary qualification it may be lost by the commission and conviction of crime and this would result in the loss of the legal right to continue in office.[67] Where residence within the district is a necessary qualification, moving out of the district with the intent to remain, which intent may be inferred from the facts, is sufficient to cause a vacancy in the office.[68]

42. **Disqualifications.**—The constitutions and statutes not infrequently proceed in a negative way

[67] Barker v. People, 3 Cow. 686 (N. Y.).
[68] Prather v. Hart, 17 Nebr. 598.

and provide disqualifications. Where the disqualifications enumerated by the constitution are intended to be exclusive, the statutes may not add to them. Where such is not evidently the intent of the makers of the constitution, the legislature is free, in the absence of specific prohibitions, to add such disqualifications as in its judgment are necessary. Where such disqualifications are provided in the statutes the courts in construing them follow the rule of strict construction.[69]

The acceptance of an incompatible office amounts at common law to a disqualification and in addition is frequently made so by statute. Offices are incompatible where, though the holding of the two and performing the duties thereof may be physically possible, the temptation not to perform the duties of both in an impartial manner is so great that ordinary human nature cannot stand the strain. Take, for instance, the offices of governor of a state and mayor of a city, where as governor it might become one's duty to remove himself as mayor. In discussing this the Supreme Court of Michigan says in Moreland v. Common Council:[70] "If a superior officer is clothed with power to remove from office an inferior officer, there is certainly no logic or reason in holding that one person may hold both. No more marked incompatibility is possible. We have been unable to find a decision which holds that one person may hold two offices, in one of which he is clothed with power to remove the person holding the other. It follows that

[69] State v. Cosgrove, 34 Nebr. 386.

[70] State v. Weston, 4 Nebr. 234; Rex v. Jones, 1 B. & Adolph. 677 (Eng.).

the offices of mayor and governor are incompatible." But where the functions of the two offices are not inconsistent and there is no constitutional or statutory inhibition against the same person holding two offices, the fact of holding one does not disqualify for holding the other. This may be considered a settled rule of the common law.

43. **Unfitness as a disqualification.**—While it is difficult in many cases to define the degree of intelligence and training necessary to qualify one to hold office, the civil service rules make an attempt to do this; and even with regard to officers not under civil service the common law and statutes make some attempts in this direction. Judges are required to be "learned in the law" and attorneys are required to pass certain examinations before being admitted to the bar. Upon this subject Throop on Officers says in § 71:

"The common law declares that unfitness, if gross and palpable, is a disqualification for holding an office. Thus it has been said:

"'If an office, either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same, *pro commodo regis et populi* (for the welfare of the king and people); for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people.' It is needless to say that the practical appli-

cation of this doctrine is generally very difficult, and, as far as our examination has extended, there is but one case in the United States where it has been applied. That case arose in the court of common pleas for the City and County of New York. A person, who was ignorant of any foreign language, had been appointed interpreter for one of the district courts of New York City, and brought an action against the city to recover his salary. It was held that he could not recover. The court said: 'In a case of a person duly appointed to an office or public employment, the rule undoubtedly is that the fitness of the appointment cannot be questioned, if he satisfies the appointing authority, in an action for the compensation attached to the office or employment, if such person performs or is ready to perform the duties required of him in his position. But the present is the case of one alleged to be wholly incompetent. There is no attempt to prove that the plaintiff is unsuited or unfit for the position he held, except in the sense of being at all times unable to perform its duties. By accepting the position of interpreter, when, if he understood no foreign language, he could not interpret at all, he stands convicted of a fraud, either upon the officer who appointed him, and upon the public from whom he was to receive compensation, or upon the latter alone.'"

44. **Bribery as a disqualification.**—In England one is by statute disqualified to hold office if he has resorted to bribery to procure it. The promise by a candidate to accept less than the regular salary is generally held to amount to bribery. It is conceded in all the cases that such offers are legally not to be distinguished from direct offers of pecuniary reward for a vote, and in some of the cases the transaction

s likened to the sale of the office.[71] The same is true where one promises to appoint another a deputy provided he will withdraw as a candidate for the office,[72] though it was held in such a case that conviction was necessary to render the defendant ineligible. The court says: "But the unlawful agreement did not of itself render the appellee ineligible to the office to which he was afterwards elected. It is true that ineligibility to hold the office to which the person violating 2327, supra, is chosen is declared to be one of the penalties for the violation of the section. These penalties, however, attach only to one who has been duly charged with, and convicted of, the misdemeanor created by the statute. It is expressly declared that, 'upon conviction thereof' the person violating the statute 'if nominated shall be ineligible to hold such office.' The provision of the statute differs materially from 6, article 2, of the Constitution. The latter makes the fact that the candidate at a popular election has given or offered a bribe, threat, or reward to secure his election an absolute disqualification for holding the office for the term for which he has been elected. It has been said to be 'self-executing.'"[73] But the penalty of the statute in this case becomes effective only after trial, conviction and judgment have taken place.

45. **Other crimes as a disqualification.**—Duelling s another crime which disqualifies. The constitutions of Virginia and Kentucky contain provisions dis-

[71] Throop, Public Officers, § 76; Robertson v. Robinson, 65 Ala. 610, LEADING ILLUSTRATIVE CASES.

[72] Gray v. Seitz, 162 Ind. 1.

[73] Carroll v. Green, 148 Ind. 362.

qualifying for this offense, and in Royall v. Thomas[74] it was held that one so engaged might be removed by quo warranto without waiting for a trial and conviction in a regular criminal proceeding. But in Commonwealth v. Jones[75] the opposite view was taken by the court. It would take too long to enumerate the various constitutional provisions disqualifying for the commission of crimes therein specified. One particularly interested in this phase of the subject is referred to § 223 of Stimson's American Statute Law.

[74] 28 Grat. 130 (Va.).
[75] 10 Bush 725 (Ky.).

CHAPTER V.

DE FACTO OFFICERS.

46. **Who are de facto officers.**—The subject of disqualifications of officers brings us to that of de facto officers, as one who would otherwise be a de jure officer may as a result of some disqualification become a de facto officer. The disqualification should not be such that the one exercising the duties of the office has no color of title, for in this case he would be a mere intruder, and an intruder is not a de facto officer, although he may by acquiescence become such. As said by the court in the case of State v. Taylor:[76] "A mere intruder or usurper is not ordinarily, but may become, an officer de facto in some cases. This can happen only by the continued exercise of the office by him and the acquiescence therein by the public authorities and the public for such length of time as to afford to citizens generally a strong presumption that he had been duly appointed. But when, without color of authority, he simply assumes to act, to exercise authority as an officer, and the public know the fact, or reasonably ought to know that he is a usurper, his acts are absolutely void for all purposes. The mere fact that, apart from his usurpation, his supposed official acts were fair and honest could not impart to them validity and efficiency."

[76] 108 N. C. 196.

The de facto officer is therefore distinguished from an intruder in that he had, when he took the office, color of title or has acquired certain rights by the acquiescence or laches of the public; and from a de jure officer in that he has not complied with all of the legal requirements necessary to give him perfect title or, having once complied with them, has for some reason ceased to possess all the necessary qualifications, yet continues to exercise the office. But as said by the court in the last cited case: "It is difficult to define in precise terms what constitutes an officer de facto in all cases. Indeed, what may constitute such officer in one case may not in another. A variety of facts and circumstances, tending to show authority of the person claiming and exercising it, go to constitute such officer, and, upon grounds of necessity and public policy, to give his acts validity as to the public and persons taking benefit of his official acts."

47. **Effects of acts of de facto officers.**—The necessities of business demand that the acts of de facto officers should be recognized by the courts as valid. Any other rule would create such uncertainty as to property rights as to be intolerable. If a decision of a judge, in a court of last resort, determining the title to property, could be set aside when, years after, it was discovered that he was a de facto officer only, a whole chain of titles might be destroyed, for in the meantime the property may have passed through scores of hands. The same result would follow if the acts of a de facto sheriff who sells property under execution could be subsequently set aside upon discovery that he was a de facto officer merely. It

might even involve the right of liberty or security of life and limb. In the case of Nofire v. United States,[77] the validity of an indictment in the circuit court of the United States depended upon the validity of the marriage of the murdered man into the Cherokee Nation, and the validity of this marriage depended upon whether the son of the clerk who granted the marriage license was a mere intruder or a de facto officer whose acts were valid. The court decided that the son of the clerk, though neither clerk or deputy, had nevertheless exercised the office for so long that he had become an officer de facto. Thus the license and marriage were valid, the circuit court was without jurisdiction and the conviction of murder was set aside.

48. **Possession necessary.**—It follows from the nature of a de facto officer's title that he must be in possession and exercising the functions of the office, for if the de jure officer, provided there be one, is in possession of the office, he is both de jure and de facto officer, and there can then be no other de facto officer, as two persons cannot be de facto officers for the same office at the same time.[78] Where the right to an office rests, as in the case quoted, upon the fact of exercising the duties of it, and as this necessitates being in possession so that the public would act upon the supposition that they are dealing with a de jure officer, the fact of possession is indispensable, the very life-blood of the claimant's title to consideration as an official. But this possession

[77] 164 U. S. 657.

[78] McCahon v. Commissioners, 8 Kan. 837.

need not of course be continuous physical possession,[79] but rather such possession as would be exercised by a de jure officer under ordinary circumstances.

49. **Powers, rights and duties.**—The powers of a de facto officer, while he continues in the exercise of the office, are the same as those of a de jure officer. His rights differ in some very important respects. He may not sue and collect compensation for his official services, because in order to do so he would first have to prove title to the office, which of course he cannot do. In discussing this point, the Supreme Court of Illinois says, in People ex rel. Winstanley v. Weber:[80] "While the acts of an officer de facto are valid, in so far as the rights of the public are involved and in so far as the rights of third persons having an interest in such acts are concerned, still, where a party sues or defends in his own right as a public officer, it is not sufficient that he be merely an officer de facto. To do this he must be an officer de jure. As an officer de facto he can claim nothing for himself." If the de facto officer has collected the salary he may be required to pay it over to the de jure officer. This rule is laid down with great clearness by the Supreme Court of New York in the case of Nichols v. Maclean:[81] "The exclusion of a de jure officer from his office is a legal wrong committed by the intruder. In a legal view it is immaterial that the defendant may have acted in good

[79] Braidy v. Theritt, 17 Kan. 468; Conover v. Devlin, 24 Barb. 587 (N. Y.).

[80] 89 Ill. 347.

[81] 101 N. Y. 526, Leading Illustrative Cases.

faith, or that he supposed he had the better title. A good motive is not an adequate answer to a claim for indemnity for a violated right. There is a great preponderance of authority in support of the doctrine that the de jure officer can recover against the intruder the damages resulting from the intrusion, and that as a general rule the salary annexed to the office and received by the defendant measures the loss."

The de facto officer has a right to protection in the exercise of official duties and to use force against those who resist him to the same extent as a de jure officer.[82] Third persons may be indicted for resisting a de facto officer.[83] The duties of a de facto officer are the same as those of a de jure officer. No one can hold himself out as a public officer without becoming liable for the performance of all the duties of the office. He is liable both for misfeasance and nonfeasance, and when ordered by a writ of mandamus to perform a duty which as a de jure officer he could be compelled to perform, it is no defense for him to set up his lack of title to the office. This is another way of saying that he may not impeach his title to office.[84] Not only is a de facto officer liable for his non-performance of duties to the same extent that a de jure officer would be, but the same is true as to the liability of his bondsmen.[85]

[82] State v. Dierberger, 90 Mo. 369.

[83] Vol. I, Bishop Crim. Law, § 464, 8th Ed.; Bohannon v. State, 89 Ga. 451.

[84] Neale v. Allegheny Tp. Overseers of Poor, 5 Watts 538 (Pa.).

[85] Boone County v. Jones et al., 54 Ia. 699.

CHAPTER VI.

COMPENSATION OF OFFICERS.

50. **In general.**—It is almost a universal rule in the United States to provide for compensating public officers for their services. The right to compensation rests not on contract or common law, but upon statutory or constitutional provisions. If no such provisions exist, the officer has no rights to compensation either against the state or against private individuals to whom he has rendered the service.[86] A failure to perform a part of the duties of the office may be sufficient cause for removal of an officer, but so long as he is not lawfully suspended or removed, it will not affect his compensation.[87] An entire abandonment of the office will, however, forfeit one's right to compensation.[88] As a failure to perform a part of the duties will not lessen the compensation, so the requirement of additional duties will not entitle an officer to extra salary, unless such duties are entirely outside the scope of the office to which the salary is attached. But in cases where an officer is required to perform duties extrinsic to those of his office, there is no right to extra compensation unless there is a promise, express or implied, to pay.[89]

[86] Crofut v. Brandt, 58 N. Y. 106; Sikes v. Hatfield, 13 Gray 347 (Mass.).

[87] Leonard v. City of Terre Haute, 93 N. E. 872; Reising v. City of Portland, 111 Pac. 377.

[88] Barbour v. U. S., 17 C. C. 149 (U. S.).

[89] Andrews v. U. S., 1 Fed. Cas. No. 381.

51. **Not a contractual right.**—That the right to compensation for official services by a public officer does not rest upon contract may readily be concluded from the fact that when the office is abolished the right to compensation ceases. If the right rested upon contract, it would not cease until the expiration of the term provided in the contract, as the abolition of the office would not be permitted to work an impairment of the obligation of the contract. If the right to compensation were contractual, the contract could not be made more onerous without entitling the officer to extra compensation.

52. **When protected by constitution.**—Although the exact amount of the salary of public officers is rarely fixed by the constitutions, that being in practically all cases left to the legislatures, it is not so unusual for the constitution to provide that the salary shall not be diminished during the term of office. Such a provision is contained in the Federal Constitution in regard to the justices of the supreme court and of the inferior courts. It is as follows: "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall at stated times receive for their services a compensation which shall not be diminished during their term of office."[90] The intent of this is to prevent the legislative branch from coercing the judiciary by a threat to reduce their pay or by actually reducing it. Though there is no remedy in case Congress were to refuse to appropriate anything for the salaries of judges, it is not probable that

[90] Art. II, § 1.

a Congress will be found in which a majority would be willing openly to violate a plain and unequivocal provision of the Constitution. In all systems of government, something must be left to the reasonableness of men.

The provision in regard to the salary of the President differs from the above in that it forbids an increase as well as a diminution during his term of office. It reads: "The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive, within the period, any other emolument from the United States, or any of them." This is clearly intended not only to prevent coercion either by threats to lower or an actual lowering of his salary, but to prevent a corrupt influencing of his action by promises of an increase of salary. The idea in both provisions is to make the executive and judiciary independent of the legislative branch of the government. Where a President is elected for a second term he may receive a higher salary during that than he did during his first term. This happened in the case of President Grant.

Some of the state constitutions have gone much further than the Federal Constitution in the matter of fixing salaries, just as they have in a great many matters which should be left to ordinary legislation. It is indicative of a distrust of their legislatures and is particularly noticeable in the newer states. A constitutional provision fixing salaries at specified amounts is undoubtedly a mistake, since it makes it

too difficult to adjust salaries to the changes in the cost of living. An example of this is to be found in the constitution of Nebraska, adopted in 1875, but now amended. It fixed the salaries of governor, auditor, and treasurer at $2,500 each per annum, and those of the attorney-general, superintendent of public instruction, and secretary of state at $2,000 per annum. Though nearly everyone recognized that these salaries were grossly inadequate because of the increased cost of living, the inertia for a long time was too great to permit a change of the constitution to readjust them to a modern standard of living. The theory of the American government, however, in fixing the salaries of its officers is based upon the principle that salaries of public officers should be sufficient in amount to permit a poor man to accept office.

53. **Assignment of salaries.**—Though there is no objection to the assignment of a salary already earned, the courts do not countenance the assignment of officers' salaries yet to be earned. The reason for this rule is that officers will render more efficient service by reason of having a greater interest in their work when there is money still due them in the way of salary than if there is nothing still due. Though this rule would not hold if all officials acted in accordance with the highest standard of ethics, common observation teaches us that it does hold, and that public policy demands that so obvious a fact be recognized. In discussing the rule, Justice Johnson of the Court of Appeals of New York says, in the case of Bliss v. Lawrence:[91]

[91] 58 N. Y. 442.

"Salaries are, by law, payable after work is performed, and not before, and while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of law-makers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that, in respect to officers removable at will, this evil could in some measure be limited by their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would on ordinary principles be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service."

54. **Salaries not attachable.**—Neither are the salaries of public officers, while still in the hands of the government, attachable by the creditors of such officers. If such a practice became common, it would consume a considerable portion of the time of the official upon whom the writs were served and would to that extent divert his attention from the performance of the duties of his office. Presumably, his time is worth more to the public when performing the duties of his office than when acting partly as a private collecting agency. The Supreme Court of the United States, speaking through Justice McLean, in the case

of Buchanan v. Alexander,[92] states the rule and the reason for it as follows: "The important question is whether the money in the hands of the purser, though due to the seamen for wages, was attachable. A purser, it would seem, cannot in this respect be distinguished from any other disbursing agent of the government. If the creditors of these seamen may, by process of attachment, divert the public money from its legitimate and appropriate object, the same thing may be done as regards the pay of our officers and men of the army and of the navy; and also in every other case where the public funds may be placed in the hands of an agent for disbursement. To state such a principle is to refute it. No government can sanction it. At all times it would be found embarrassing, and under some circumstances it might be fatal to the public service."

55. **Pensions.**—As an incentive to more faithful service and accepting of office at lower salaries, the state may provide a system of pensioning its public officers. In the military and naval service this is a familiar practice, but as yet it has not become at all common in our civil service. If it can be considered as a part of the compensation for services, the legislature has the power to provide for it and may pay it out directly through its own agents or through a private association.[93] But, where it may be considered a mere gratuity, as where it applies to officers whose term of service ended before the law was passed, the power of the legislature has been ques-

[92] 4 How. 20 (U. S.).
[93] Commonwealth v. Walton, 182 Pa. 373.

tioned, and in the case of Mahon v. Board of Education[94] it was held that under these conditions the legislature did not have the power. Pensions, like salaries, are not claims in which there is a vested right, and unless protected by the Constitution they may be discontinued by the legislature at any time.[95] To quote from the opinion of the Supreme Court in United States v. Teller: "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall at its discretion." In support of this conclusion it cites Walton v. Cotton.[96]

[94] 171 N. Y. 263.
[95] United States v. Teller, 107 U. S. 64.
[96] 19 How. 355 (U. S.).

CHAPTER VII.

POWERS OF PUBLIC OFFICERS.

56. **Classification of powers.**—The powers of public officers are either express or implied, that is, they are either set forth explicitly in the Constitution or statutes or implied from these express powers or from the common law powers of similar officers. Of course if the office is a new one, not known to the common law, as for instance that of railway commissioner, we must then look to the Constitution and statutes exclusively in order to determine the powers which such an officer may legally exercise. In case of a common law office, the Constitution or statutes may of course expand the powers of the officer, but if they create the office by name and are silent as to the powers, it will be presumed that they are the same as at common law. There are comparatively few officers whose powers are fixed in the Constitution. In order to make changes reasonably easy and to keep the Constitution from becoming too voluminous a document, the work of prescribing the powers of officers is in the great majority of cases left to the legislature. The Federal Constitution defines the more important powers of the President; in a general way, of the members of Congress, by defining the powers of Congress; and of the Supreme Court judges, by defining the jurisdiction of the Supreme

Court. That is, it defines in part the powers of a few score of federal officers, leaving the powers of the several thousand others to be defined by statute.

57. **Territorial limitations.**—The right of a public officer to exercise any powers at all are limited to the district within which he has jurisdiction; outside of that area his powers are the same as those of any other private citizen, unless otherwise provided by Constitution or statutes. In discussing this subject the Supreme Court of Rhode Island, in the case of Page v. Staples,[97] thus sets forth the law: "We do not think that the defendant can justify the taking of the plaintiff through a part of Kent County for the purpose of committing him to the jail in Providence County. In the absence of statutory provisions, the power of a sheriff is limited to his own county. He is to be adjudged as sheriff in his own county and not elsewhere. He cannot, therefore, execute a writ out of his own county, and if he attempts to do so, becomes a trespasser. The only exceptions to this principle are, that having a prisoner in his custody upon a writ of habeas corpus, he has power, by virtue of the writ, to travel through other counties, if necessary, in order to take his prisoner to the place where the writ is returnable; and he may, also, upon fresh pursuit, retake a prisoner who has escaped from his custody into another county."

58. **Limitations due to personal interest.**—It is a well recognized principle of common law that a judge shall not sit in a case in which he has a personal interest, whether this be due to relationship, finances,

[97] 13 R. I. 306.

professional services, or other cause which would be likely to interfere with his deciding impartially. This is merely the legal recognition of a truism that men do not make good judges in their own case. In Moses v. Julian,[98] the court says: "The judge who is satisfied that he is legally disqualified to act in a case ought not to wait until the parties object to him, but should refuse to hear the cause, by an entry on the docket that he does not sit in the case. This is the immemorial practice of the courts and of constant occurrence." In this case a will was set aside because the judge before whom it was probated had acted as counsel in drawing it up. The same rule applies to administrative officers, and in Goodyear v. Brown,[99] the court held void a title to property resting upon a warrant issued to himself by a deputy secretary of internal affairs, and awarded the land to the adverse claimant. "We presume it was innocent. Nevertheless, to litigants whose property is at stake, and to speculators, measuring the acts of men by the common business standards, it suggests possible dangers and temptations on which we will not enlarge. Such dealings by an officer are to be regretted because of their necessary consequences; and a proper consideration for the public security, and for the confidence of citizens in the officers of the state, forbid them. Whether we consider the interests of the citizens for whose security and protection the state exists, or the preservation of public confidence in the purity of the administration of

[98] 45 N. H. 52.
[99] 155 Pa. 514.

public affairs, or the honor and character of the officer as a public servant, the conclusion reached is the same. Public policy cannot tolerate such dealings by an officer within his own department or office. It will not uphold them."

59. **Limitations due to separation of powers.**—Though the principle of separation of powers into legislative, executive, and judicial is not strictly adhered to in the United States, there is nevertheless a sort of presumption against the exercise by the officials of one department of powers which properly belong in another department of government. Whether or not the power exercised is in violation of this principle, and if so, whether or not the violation is one forbidden by law or public policy, is in the last analysis a question for the courts. In some states the separation of powers is specifically provided for in the constitutions.

60. **When powers exercised by boards.**—If an official power instead of being exercised by one person is entrusted to a board of three or more, it must be exercised by them acting as a board. While it is not necessary that all concur in the action, it is necessary, in order that it be considered an action by the board, that all should have had notice of the meeting, that a quorum should have been present, and that a majority of the quorum should concur. In Cooley v. O'Connor,[1] the supreme court reversed a decision of the circuit court excluding a tax certificate on the ground that it was signed by but two of the three tax commissioners, and thus set forth the

[1] 12 Wall. 391 (U. S.).

rule as to the action of boards: "It is true that when an authority is given jointly to several persons they must act jointly or their acts are invalid. This is a general rule for private agencies, though it is not universal in its application. But the rule is otherwise when the authority is of a public nature, as it was in this case. The commissioners were public agents, clothed with public authority. They were created a board to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number."

Provided there is a quorum present, and the meeting otherwise regular, it is sufficient that a majority of those voting and not an absolute majority of the whole board vote in the affirmative. In Rushville Gas Co. v. City of Rushville,[2] the court was called upon to decide upon the legality of a resolution of the city council, the council consisting of six members, three of whom voted for the resolution and three did not vote at all. The following is the substance of the opinion of the court:

"The rule is that, if there is a quorum present and the majority of a quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required; all that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution and one had voted against it, or had not voted at all, no one

[2] 121 Ind. 206.

would hesitate to affirm that the resolution was duly passed, and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effective. The mere presence of the inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence, rather than opposition. Their refusal to vote is a declaration that they consent that the majority of the quorum may act for the body of which they are members."

But the board in order to make their action binding upon the body they represent must act as a board. This is very clearly brought out by the Supreme Court of Ohio in McCortle v. Bates.[3] In this case five of the six school directors had without a meeting of the board signed an order for school apparatus. In support of the conclusion that such act would not bind the township, the court says:

"The board is constituted, by statute, a body politic and corporate in law, and as such is invested with certain corporate powers, and charged with the performance of certain public duties. These powers are to be exercised, and these duties, discharged, in the mode prescribed by law. The members composing the board have no power to act as a board except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for that purpose, all their official proceedings. They have, in their corporate capacity, the title, care, and custody of all school property

[3] 29 Ohio St. 419.

whatever within their jurisdiction, and are invested with full power to control the same in such manner as they think will best subserve the interest of the common schools and the cause of education. They are required to prescribe the rules and regulations for the government of all the common schools within the township. Clothed with such powers and charged with such duties and such responsibilities, it will not be permitted to them to make any agreement among themselves, or with others, by which their public action is to be, or may be, restrained or embarrassed, or its freedom in any wise affected or impaired. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of, and upon, the public matters intrusted to them, in the session provided by the statute."

61. **Acts in excess of authority.**—Acts of public officers, whether acting as individuals or as a board, will not bind the governmental unit which they represent, unless within their authority or ratified by the body having authority to ratify them.[4] Neither is it sufficient, as in the case of private agents, that they be within the apparent authority of the public officer; they must be within his actual authority. The reason for this is that the authority of public officers, unlike that of private agents, is defined by law and definite notice thereof is therefore accessible to all dealing with them. The person dealing with a public officer has, legally speaking, as good an opportunity as the officer himself to decide as to the extent of the

[4] Orange City v. Texas & N. O. R. Co., 35 Tex. Civ. App. 361, 80 S. W. 670.

officer's authority. In Whiteside v. United States,[5] the Supreme Court of the United States, speaking through Justice Clifford, says in justification of this rule: "Although a private agent, acting in violation of specific instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents than to adopt a rule which, through improper combinations or collusion, might be turned to the detriment and injury of the public. Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in official capacity, and the rule applies in such a case that ignorance of the law furnishes no excuse for any mistake or wrongful act."

[5] 93 U. S. 247.

CHAPTER VIII.

DUTIES OF PUBLIC OFFICERS.

62. **Classification.**—Official duties may be divided into discretionary and ministerial. Both alike are prescribed by law, either expressly or by implication, but differ in that ministerial duties may be delegated and may be compelled or restrained by the courts, while a discretionary duty may not, and the officer may be called to account only for an abuse of the discretion. The filing of a proper legal document by a clerk charged with that duty may be compelled by mandamus, as may the payment of a lawful claim by the official having custody of the money for that purpose, but the location of a bridge at one point on a stream rather than another, by commissioners having power to choose a site, will not be compelled by mandamus. These principles are so well established that it is unnecessary to cite authorities in support of them.

The courts will not by injunction restrain public officers in the exercise of discretionary duties, except for an abuse of discretion. In Davis & Palmer v. Mayor of the City of New York,[6] the superior court sustained an injunction restraining the aldermen from granting a franchise to Jacob Sharp and others to operate a street railway in Broadway and charge five-cent fares, on condition that they pay a

[6] 9 N. Y. Sup. Ct. 663.

license fee of $20 a car per annum, notwithstanding there were other reliable parties willing to take the franchise at a license fee of $1,000 per car per annum and three-cent fares. The court thus justifies its use of extraordinary power:

"As between two such propositions, there can be no pretense for saying that in the exercise of an honest discretion the former might be preferred to the latter. It is not a debatable question whether a license fee of $1,000 per car per annum is more advantageous to the city than one of $20, nor whether the interests of the community will be better subserved by each citizen being compelled to pay a fare of three cents, instead of five. Therefore, even if it can be successfully maintained that the common council had the power to make the grant which the resolutions purport to make, it would be a gross abuse of power, and a flagrant violation of public duty, to make the grant as it was made, instead of making it to those who would pay, at the least, an additional million of dollars for it into the public treasury, and exact from the passengers only three cents fare, instead of five. Is it incontestable that such an abuse of power and violation of duty cannot be restrained by any court?"

63. **When only apparently discretionary.**—An official duty may appear from the wording of the statute imposing it to be discretionary when it is really ministerial. For instance, a statute may provide that a city council or other taxing body may levy taxes up to a certain limit. This grant will under certain circumstances be interpreted to mean that the council or other body shall levy taxes up to that limit. Even

though the words, "may, if deemed advisable," which ordinarily confer discretionary power, are used, they will still be interpreted as "shall," provided the money is needed to pay contract debts. The courts will not allow taxing bodies, having the power to do so, to deem it inadvisable to make such levy as is necessary to pay valid debts, and will by mandamus compel them to perform their duty.

In Supervisors v. United States,[7] the Supreme Court was called upon to interpret the following act: "The board of supervisors under township organization, in such counties as may be owing debts which their current revenue under existing laws is not sufficient to pay, may, if deemed advisable, levy a special tax, not to exceed in any one year one per cent, upon the taxable property of any such county, to be assessed and collected in the same manner and at the same time and rate of compensation as other county taxes, and when collected to be kept as a separate fund, in the county treasury, and to be expended under the direction of the said county court or board of supervisors, as the case may be, in liquidation of such indebtedness." Counsel for appellant insisted that this clothed the board with discretionary power, but the court, after citing The King v. Inhabitants of Derby, Skinner, 370; King & Queen v. Barlaw; Mayor of the City of New York v. Furze, 3 Hill, 614; and Mason v. Fearson, 9 Howard, 248, in which language ordinarily permissive was interpreted as mandatory, the court sums up the law as follows: "The conclusion to be deduced from the authorities is, that

[7] 4 Wall. 435 (U. S.).

where power is given to public officers, in the language of the act before us, or in equivalent language —whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty."

64. **Ministerial duties of judicial officers.**— Where, as not infrequently happens, ministerial duties are performed by judicial officers, whose duties are in the main discretionary, performance of such ministerial duties is enforced in the same way as though they were to be performed by a ministerial officer. To hold otherwise would be to enable the legislature to deprive many people of their legal rights by casting ministerial duties on judicial officers. In Grider v. Tally,[8] the plaintiff asked for a mandamus to compel the defendant, a probate judge, to grant a license to sell liquor in the town of Belleforte, "having first complied with all the requirements of the law in relation to the granting of license to sell liquor." The mandamus was granted by the circuit judge and upon appeal his action was sus-

[8] 77 Ala. 422.

tained by the supreme court of the state. The defendant still refusing to grant the license, the circuit judge issued an attachment directing the sheriff to take said Tally into his custody and "him safely to keep until he issued a license as prayed." The section of the Code providing for the issuing of licenses is as follows: "No license must be granted to sell vinous or spiritous liquor, unless the applicant produce to the judge of probate of his county, or to the person authorized by law to grant such license, the recommendation of ten respectable freeholders and householders thereof, residing within four miles of such applicant, stating that they are acquainted with him, that he is possessed of good moral character, and is in all respects a proper person to be licensed." In interpreting this provision, the court says: "No power is conferred on the probate judge to pass on the moral character of the applicant, or whether he is a proper person to be licensed, or on the propriety of issuing a license. He adjudges nothing—decides no question. On the production of the proper recommendation, taking and subscribing the prescribed oath, and paying the requisite amount, it is the clear and specific duty of the probate judge to issue the license."

For the purpose of distinguishing judicial from ministerial acts, the court lays down the following rule: "Judicial power is authority, vested in some court, officer, or person, to hear and determine, when the rights of persons or property, or the propriety of doing an act, are the subject-matter of adjudication. Official action, the result of judgment or dis-

cretion, is a judicial act. The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing, is a ministerial act."

This case illustrates very well the inadvisability of casting ministerial duties upon judicial officers. It tends to bring the judiciary into disrepute, to make for the judge political enemies without sufficient compensating features. As the common feeling of the community is that a judge exercises discretion in his acts, his judgment should not be brought into disrepute by his being required to perform duties which must be performed in a particular way, regardless of what his judgment might dictate. A judge who has been put in jail for contempt is not likely to retain the respect of the community to the same degree as he previously possessed it, and respect for the judiciary is no mean force in securing obedience to and respect for law.

CHAPTER IX.

LIABILITIES OF PUBLIC OFFICERS.

65. **Protection of individual rights.**—In order that government may not be irresponsible, it is desirable that in so far as possible the individual citizen shall have recourse against an officer for a failure to perform duties owing to the individual citizen and that the public shall have recourse for duties owing to the public. The liability for a failure to perform the latter class of duties can be enforced only in an action by the state. The leading case on this point is that of South et al. v. State of Maryland.[9] Here Potle, the real plaintiff in the original action, brought suit on the official bond of South alleging that he, South, as sheriff of Washington County, refused to give him, the said Potle, protection, and that by reason of South's failure to perform his official duty in keeping the peace of the state of Maryland, plaintiff was compelled to give to certain persons, who threatened his life, the sum of $2,500. The court held that this was a "public duty for neglect of which he is amenable to the public, and punishable by indictment only."

66. **Liability of judicial officers.**—The class of officers against whom the rule of individual liability for their acts is most relaxed is that of judicial offi-

[9] 18 How. 396 (U. S.).

cers. As regards judges there is no civil liability for their acts, provided they act within the limits of their jurisdiction. In Randall v. Brigham,[10] the Supreme Court of the United States held that the removal of an attorney by the court was a judicial act, so decided in Ex parte Secombe,[11] and that "it is a general principle, applicable to all judicial officers, that they are not liable to a civil action for a judicial act done within their jurisdiction. This exemption from civil action is for the sake of the public, and not merely for the protection of the judge. And it has been maintained by a uniform course of decisions in England for centuries and in this country ever since its settlement." The plaintiff had contended that "each individual of society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws," and based this contention upon Article X of the constitution of Massachusetts. He maintained that the terms "life, liberty, and property" include every right known to the law, and that "property includes those estates which one may acquire in professions, which are often the source of the highest emoluments and honor"; further, that "an attorney and counselor being by the solemn judicial act of the court clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the

[10] 7 Wall. 523 (U. S.).
[11] 19 How. 9 (U. S.).

legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency." This language was quoted from the opinion of the Supreme Court in Ex parte Garland.[12] But in that case the removal was by an act of Congress and not by the court. The court admits that Mr. Garland, an attorney, could be removed from his office by the court for "moral or professional delinquency," and the undisputed facts showed "moral and professional delinquency" on the part of Randall in the former case. As to the civil liability of a judge for acts that are not malicious and not in excess of his jurisdiction, the question is no longer an open one; it has been decided that there is none and there is apparently no likelihood that there will be any change in the rule.

67. **Liability for acts in excess of jurisdiction.**— Whether or not a judge is liable civilly for acts in excess of jurisdiction depends to some extent upon the character of court over which he is presiding. If the court is one of general jurisdiction the authorities are pretty generally of the opinion that he is not civilly liable for his acts.[13] Thus in Bradley v. Fisher[14] the court says: "Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. In this country the judges of the superior courts of record

[12] 4 Wall. 333 (U. S.).
[13] 7 Wall. 523 (U. S.).
[14] 13 Wall. 335 (U. S.).

are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office.

"If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. In some states they may be suspended or removed without impeachment, by a vote of the two houses of the legislature." In Randall v. Brigham, supra, the court expresses a doubt as to the exemption of judges for acts in excess of jurisdiction where the judge acts maliciously or corruptly. To quote the exact language of the court: "They are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly."

There is also some conflict as to whether the exemption from civil liability accorded to judges of courts of general jurisdiction for acts in excess of jurisdiction extends also to judges of courts of inferior jurisdiction. Though the tendency at present is in this direction, the weight of authority is still in favor of the established rule that judges of inferior courts are not exempt from civil liability for acts in excess of their jurisdiction. In Truesdell v. Combs[15] it was held that where a justice of the peace without authority of law issues a process for arrest he will be guilty

[15] 33 Ohio St. 186.

of trespass, and honesty of purpose is no defense; or where a justice with full knowledge of the facts issues a warrant for arrest in case of a crime committed in another state, he is liable;[16] or where a magistrate acts officiously in issuing a warrant for arrest without a complaint on oath or personal knowledge that a complaint has been made, is liable;[17] or where a justice of the peace instigates the execution of a state warrant for felony nine months after the warrant has issued, the party who procured it having made no recent application to have it executed, the justice, being apparently actuated by malice, was held liable;[18] also where a justice of the peace caused a suit to be instituted upon a promissory note of which he was the owner and made the summons returnable before himself, rendered judgment, and issued a writ of execution, and caused defendant's arrest and commitment to jail, he was held liable;[19] and it was held in Fisher v. Deans[20] that a justice who commits a person to jail for the purpose of extorting money from him is liable for false imprisonment; but, on the contrary, it was held in Austin v. Vrooman[21] that a justice of the peace is not personally liable in damages for erroneously deciding in good faith that he has jurisdiction to try a defendant who has offered bail for appearance before the grand jury and demanded a trial by jury after indictment,

[16] Miller v. Grice, 2 Rich. L. 27 (S. C.).
[17] Flack v. Harrington, Breese 213, 12 Am. Dec. 170 (Ill.).
[18] Garvin v. Blocker, 2 Brev. 157 (S. C.).
[19] Dyer v. Smith, 12 Conn. 384.
[20] 107 Mass. 118.
[21] 28 N. E. 477 (N. Y.).

where the justice had jurisdiction of the offense and of the defendant except for such offer and demand. If, furthermore, the want of jurisdiction results from facts not within the knowledge of the magistrate, so that he did not know or had not the means of knowing that he was without jurisdiction, he is not liable.[22] Courts of general jurisdiction are presumed to have jurisdiction until the contrary is shown.[23]

68. **Distinction between excess and absence of jurisdiction.**—The authorities recognize a distinction between cases where there is an entire want of jurisdiction over the subject-matter and where jurisdiction is possessed for some purposes but is exceeded by extending it to cover more than was intended by statute. In the former case the whole proceeding is *coram non judice* (before one not a judge), and the judge is liable.[24] An example of this would be where a judge not misinformed as to the facts upon which jurisdiction depends were to issue a summons to be served outside his territorial jurisdiction and then punish for contempt the person who disregarded it. In such a case he would be liable to the person so punished.[25] But if the magistrate has no jurisdiction by reason of the existence of facts which he cannot be supposed to know, but which are peculiarly within the knowledge of the party aggrieved, the former is not liable if he has no actual knowledge of such facts.[26]

[22] Calder v. Halket, 3 Moore P. C. 28 (Eng.).
[23] Piper v. Pearson, 2 Gray 120 (Mass.).
[24] Marshalsea's Case, 10 Coke 68b (Eng.).
[25] Houlden v. Smith, 14 Q. B. 841 (Eng.).
[26] Pike v. Carter, 3 Bing. 78 (Eng.).

This distinction between an entire lack of jurisdiction and excess of jurisdiction is well brought out by the Supreme Court of the United States in Bradley v. Fisher,[27] where the court, speaking through Justice Field, says:

"Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is an usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is vested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain dis-

[27] 13 Wall. 335 (U. S.).

trict, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil actions for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reason."

69. **Liability of judicial officers to the state.**—But the fact that judicial officers may be exempt from civil liability to those injured by their malicious, corrupt, oppressive acts, and acts in excess of their jurisdiction, does not mean that they are exempt from all liability whatsoever. The state whose servant the judge is has a right to call him to account for the improper exercise of the power he possesses or an attempt to exercise power which he does not lawfully possess. The ordinary remedy in such a case is impeachment.[28] The difficulty of applying this

[28] Pratt v. Gardner, 2 Cush. 63 (Mass.); Floyd v. Barker, 12 Coke 23 (Eng.).

remedy has led to the advocacy, and in some states the adoption, of another method, and as this is one of far-reaching consequences in the administration of justice, and is at present a live issue, we feel warranted in discussing it.

70. **Recall of judges.**—Very recently, certain reformers have devised the plan of calling a judge to account for his official acts by forcing him to submit to a vote of the electors the question of whether or not he may be allowed to serve out the remainder of his term, and, unless he receives a plurality of the votes cast at the election called for the purpose, he is removed. This was made a national question by the refusal of President Taft to sign the bill admitting Arizona into the Union until the provisions for the recall of judges were eliminated from their constitution. It tends to render tenure too dependent upon the whims of the momentary majority, it decreases the efficiency of officers and makes it impossible to induce men best fitted for judicial position to accept office. It is unfair to the judge, for either one of two things will happen: the fitness or unfitness of the judge will be determined upon the basis of a single decision, or upon his whole career. The former is manifestly unfair and the latter is often impracticable, requiring more time for investigation than the voters can give. It injects too much politics into the judiciary, of which we are already suffering from an overdose. It sweeps away the protection which the minority has against hasty, tyrannical action by the majority and this protection is one of the tests of the advance in civilization which a people

has made. It would exercise a mischievous influence upon judicial procedure, as the judge would try his case in the newspapers and according to popular desires instead of in accordance with rules of procedure which the experience of mankind has shown to be useful in the administration of justice. It is unnecessary, because in cases of real as distinguished from fancied corruption or unfitness such as to warrant removal, impeachment is or can easily be made a sufficient remedy.

71. **Liability of officers other than judicial.**—Let us take first quasi-judicial or administrative officers. As to these, the general rule is that they decide questions as to the extent of their jurisdiction at their peril and are liable for injuries resulting from acts in excess of their jurisdiction. The decision of sanitary officers that a thing is a nuisance is as a rule considered a ministerial and not a discretionary act, and liability results from an erroneous determination in case of excess of jurisdiction. As said by the New York Court of Appeals in People v. Board of Health of the City of Yonkers:[29]

"If the decisions of these boards were final and conclusive even after a hearing, the citizen would in many cases hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated, and generally unfitted to discharge grave judicial functions. Boards of health cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order abating an alleged

[29] 140 N. Y. 1.

nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance which gives them jurisdiction to act. It may be said that if the determination of a board of health as to a nuisance be not final and conclusive, then the members of the board, and all persons acting under their authority in abating the alleged nuisance, act at their peril; and so they do, and no other view of the law would give adequate protection to private rights. They should not destroy property as a nuisance unless they know it to be such, and, if there be doubt whether it be a nuisance or not, the board should proceed by action to restrain or abate the nuisance, and thus have the protection of a judgment for what it may do."

So in Welch v. Stowell,[30] city officers were held liable for destroying a building used as a house of ill-fame. The general principle underlying this decision is that where merely the use to which a thing is put, and not the existence of the thing itself, constitutes the nuisance, the abatement of the nuisance by the destruction of property is unwarranted, since the restraining of the use, which could be done by injunction, rather than by the destruction of property which is capable of a harmless, legitimate use, meets all the requirements of the case. It is the same principle which would render officers liable for the destruction of a barn near a spring because cattle were kept in it and the cattle polluted the water of the spring.

72. **Conclusiveness of acts of quasi-judicial boards.**—As to the conclusiveness of the acts of a quasi-judicial board the court says in City of Salem

[30] 2 Dougl. 332 (Mich.).

v. Eastern Railway Co.:[31] "The record of proceedings of the board of health is competent evidence in the present case for some purposes. It proves the fact that such proceedings were had, which is a necessary preliminary step. So far as the proceedings were within and in accordance with the authority and duties of the board, they are entitled to the presumption that whatever was done was rightly done; and may be held as prima facie evidence of the existence of a nuisance which warranted the board of health in taking action and incurring expense for its removal. But it is not evidence that the nuisance was caused by the defendant, in the manner stated, or in any manner; and all the facts upon which it is sought to charge the defendant with liability are open to be tried and determined by the proofs in the case." And in Mygatt v. Washburn,[32] where the plaintiff's property was placed on the assessment roll after July 1, when the roll was required by statute to be complete on that date, the assessors so acting were held liable for the damages resulting to plaintiff from their act. The court says:

"The plaintiff, therefore, was not subject to the jurisdiction of the assessors. In placing his name on the roll, and adding thereto an amount as the value of his personal property, they acted without authority. As the board of supervisors was obliged by law to annex a tax to the name of every person assessed upon the roll, and to issue a warrant for the collection of the tax, the unauthorized act of the assessors was

[31] 98 Mass. 431.

[32] 15 N. Y. 316; also see Potts et al. v. Breen et al., 167 Ill. 67, LEADING ILLUSTRATIVE CASES.

he means by which the property of the plaintiff was rocured to be sold. They are, therefore, responsible o the plaintiff for the damages which ensued. It was not, in the view of the law, the case of an error f judgment. It is a salutary rule, though in some ases, and perhaps in the one before us, it may operate arshly, that a subordinate officer is bound to see hat he acts within the scope of the authority legally ommitted to him. The principle is too well settled o require a reference to authority; but its applica- ion to the case of assessment of a person not liable o taxation in the town or district in which the assess- ment is made has often been declared in the courts of his and other states."

73. **Manner of acting as affecting liability.**—It ot infrequently happens that officers will be liable n case of summary action, as in the abatement of a uisance, where in the same case they would not have een liable had an opportunity for a hearing been iven. This is particularly true where the statute rovides for notice and hearing. Where such oppor- unity has been given, the officers are then considered s having so acted that their decisions are in the ature of judicial determinations and they are not able for error, even though their error may have esulted in loss to those affected by the decision. All that is necessary is that they comply with the tatute and act in good faith. Thus, in the case of ee v. Huff,[33] it was held that a county examiner was ot liable for revoking the license of a teacher, after hearing. The court says: "When under this stat- te a teacher has been cited to appear and answer

[33] 33 S. W. 846 (Ark.).

charges preferred against him, and when, after a fair investigation, the examiner honestly concludes that the teacher has been guilty of such conduct as, under the statute, justifies a revocation of his license, he is not liable for damages, whether his decision be correct or not. He must follow the statute under which he receives authority, but whether the evidence is sufficient to make out a proper case under the statute is for him to determine. The law reposes this discretion in him, and will protect him when he acts honestly and in the faithful attempt to discharge his duties." It quotes with approval the language of Judge Appleton of the Supreme Court of Maine, in Donahoe v. Richards:[34] "The general principle is established by an almost uniform course of decision that a public officer, when acting in good faith, is never liable for an erroneous judgment in a matter submitted to his determination. All he undertakes to do is to discharge his duty to the best of his ability and with integrity. That he may never err in his judgment, or that he may never decide differently from what some other person may think would be just, is no part of his official undertaking."

74. **Liability for ministerial acts.**—In case of ministerial acts there is the highest degree of liability. For acts of this character, provided the duty is not one owed solely to the public, the officer is liable for malfeasance, misfeasance, and nonfeasance, where his act results in damages to the one to whom he owes the duty. In Amy v. Barkholder et al.,[35] the

[34] 38 Me. 379.

[35] 11 Wall. 136 (U. S.); also see State v. Gardner, 54 Ohio St. 24, LEADING ILLUSTRATIVE CASES.

Supreme Court of the United States, speaking through Justice Swayne, says: "The rule is well settled that where the law requires absolutely an act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages, to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender." In this case the plaintiff was allowed $12,108.03 for injury caused by reason of the failure of the defendants, who were supervisors of Des Moines County, to levy a tax, and this notwithstanding the fact that they were enjoined by the county court from levying the tax, and the statute making them individually liable for losses had been repealed. The county court was held to be without authority to enjoin them and the repeal of the statute to have no effect upon rights already vested under it.

75. **What are ministerial acts.**—This difference in liability for ministerial and discretionary acts makes it important to decide what are ministerial acts. For this purpose the test is whether or not the performance of the act can be compelled by mandamus.[36] In Ex parte Batesville & B. Ry. Co.,[37] the court has defined a ministerial act to mean: "One which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety

[36] Grider v. Tally, 77 Ala. 422; Gillespie v. Palmer, 20 Wis. 572, LEADING ILLUSTRATIVE CASES.

[37] 39 Ark. 82.

of the act done." Also in Bassett v. Atwater:[38] "It is a precise act, accurately marked out, enjoined upon particular officers for a particular purpose." Though there may be discretion in the manner of performing an act, it may still be regarded a ministerial act and compellable by mandamus if there is no discretion as to whether or not it shall be performed at all.[39] It does not follow that an act is not ministerial "because the person performing it may have to satisfy himself that the state of facts exists under which it is his duty to perform the act."[40] With ministerial, as with discretionary, duties, if the officer keeps within his legal authority, his motives are immaterial.[41]

76. **Liability for acts of subordinates.**—Superior officers are not as such liable for the acts of their subordinates, whether the latter are employees or officers.[42] In Robertson v. Sichel,[43] which was a case involving the liability of the collector of customs for a trunk lost through the negligence of one of his subordinates, the court lays down with clearness the rule: "The subordinate who was guilty of the wrong, if any, would undoubtedly be liable personally for the tort; but to permit a recovery against the collector, on the facts of this case, would be to establish a principle which would paralyze the public service. Competent persons could not be found to fill posi-

[38] 65 Conn. 355.

[39] Kendall v. United States, 12 Pet. 524 (U. S.).

[40] Flournoy v. Jeffersonville, 17 Ind. 169.

[41] Spalding v. Vilas, 161 U. S. 483.

[42] Hall v. Smith, 2 Bing. 156 (Eng.); Tracy v. Swartwout, 10 Pet. 80 (U. S.), LEADING ILLUSTRATIVE CASES.

[43] 127 U. S. 507.

sions of the kind, if they knew that they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person."

This does not mean that the superior may not, by directions to his subordinates, or by selecting subordinates known to be irresponsible or incompetent, or by failing to require proper guarantees from them, become himself liable for their acts.[44] It is a rule of simple justice that officers are not liable for the acts of their predecessors.[45] All courts agree upon this proposition, and no discussion of its expediency is necessary.

77. **Form of official liability.**—The liability of public officers may be either criminal or civil, and the latter may be either on contract or in tort. Of course an officer is criminally liable for his acts in his capacity as an individual member of society, the same as any other citizen,[46] but what is meant here is his criminal liability for his official acts. This latter may be either common law or statutory liability. At common law the failure or neglect to perform a ministerial duty imposed upon him by law made the officer liable to indictment for a misdemeanor.[47] But in case of discretionary duties, a failure does not render the officer criminally liable unless it can be shown to be wilful or corrupt.[48] The statutes may

[44] Dunlop v. Munroe, 7 Cranch 242 (U. S.).
[45] Vose v. Reed, 54 N. Y. 657.
[46] State v. McLean, 121 N. C. 589.
[47] Rex v. Commings, 5 Mod. 179 (Eng.).
[48] Rex v. Webb, 1 W. Bl. 19 (Eng.).

provide for additional criminal liability, unless prohibited by the Constitution.[49] Such statutes, being penal, are construed strictly.[50] Where the statute penalizes only wilful or malicious conduct, mere neglect is not sufficient to bring the act within the statute.[51] But under a statute making it an offense for an officer to give a certificate of receipt fraudulently, it is not necessary to prove intent to defraud the persons to whom it was given.[52]

78. **Liability on contract.**—Officers are not liable upon contracts made in their official capacity unless the contract clearly shows they intended to assume a personal liability.[53] Unlike the agent of a private party, an officer will not incur individual liability by exceeding his authority, for as the extent of his authority is determined by law, those with whom he deals have the same opportunity as he to judge whether or not the act is within the scope of his authority.[54] His official bond being a personal contract, he is of course liable on it, and the extent of the liability is determined by the bond itself.[55] Any contract to turn over the duties of one's office to another, except as regards purely ministerial duties, is void. With regard to such a contract, the Supreme Court of Alabama said, in Robertson v. Robinson: "No judicial tribunal, so far as we can discover, has ever given countenance to any such agreement; and

[49] Comlth. v. Williams, 79 Ky. 42.
[50] Dutton v. Phila., 9 Phila. 597.
[51] State v. Hein, 50 Mo. 362.
[52] State v. Morse, 52 Iowa 509.
[53] New York & Charleston Steamship Co. v. Harbison, 16 Fed. 688.
[54] Hall v. Lauderdale, 46 N. Y. 70.
[55] Hoboken v. Harrison, 30 N. J. L. 73.

popular elections are to be kept free from the taint of selfishness and corruption—if public offices are to be dignified as public trusts, and the performance of official duty preserved from the contamination of unlawful and improper influences—all such agreements will be condemned."

79. **Liability in tort.**—When one by virtue of his office seizes the property of another and in so doing acts in excess of his authority he commits a trespass and may be sued in tort for the resulting damages. Or, to put it in more general terms, where an officer acts ministerially and is bound to render certain services to individuals, as the execution of a writ or process, or is bound to render any services to individuals for a compensation in fees or salary, he is liable in tort, for misfeasance or nonfeasance, to the party injured by his acts.[56] Also where an individual is prevented by an officer from exercising a right which it is lawful for him to exercise, he has an action in tort for damages against the officer for hindering him.[57]

80. **Exemption of legislative officers.**—It may be said down as a fundamental principle of American and English jurisprudence that legislative officers are not liable personally for the injury caused by their legislative acts.[58] This immunity extends not merely to members of Congress and state legislatures, but to councilmen of a municipal corporation as well. As said by the court in Jones v. Loving:[59]

[56] South v. Maryland, 18 How. 396 (U. S.).
[57] Ashby v. White, 2 Lord Raym. 938 (Eng.).
[58] Baker v. State, 27 Ind. 485.
[59] 55 Miss. 109.

"It certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously towards the person aggrieved by the passage of the law. Whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with all the immunities of government, and are exempt from all liability for their mistaken use."

But this immunity does not extend to slanderous remarks having no connection with the business at that time before the legislative body. This rule is well stated by the Supreme Court of Massachusetts in Coffin v. Coffin[60] in the following language: "And I do consider a representative holden to answer for defamatory words, spoken maliciously, and not in discharging the functions of his office. But to consider every malicious slander uttered by a citizen who is a representative as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privileges further than was intended by the people, or than is consistent with sound policy; and would render the representatives' chamber a sanctuary for calumny, an effect which never has been, and, I confidently trust, never will be, endured by any house of representatives of Massachusetts."

[60] 4 Mass. 1, Leading Illustrative Cases.

CHAPTER X.

LIABILITY OF GOVERNMENT FOR ACTS OF ITS OFFICERS.

81. **State and federal governments.**—While sovereignty cannot be sued except by its own consent, the United States has made provision for being sued through the Court of Claims, and several states have followed its example. The Tucker Act of March 3, 1887, provides that the Court of Claims shall have jurisdiction over "all claims founded upon the Constitution of the United States or any law of Congress except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages liquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable." And in Dooley v. United States,[61] this act was held to give the Circuit Court, sitting as a court of claims, jurisdiction in a case brought for the recovery of duties improperly collected by custom-house officials. In reversing the Circuit Court on the question of jurisdiction the Supreme Court says: "In the cases under consideration the argument is made that the money was tortiously exacted; that the alternative of payment to

[61] 182 U. S. 222.

the collector was a seizure and sale of the merchandise for the non-payment of duties; and it mattered not that at common law he had an action against the collector to recover them back. But whether the exactions of these duties were tortious or not; whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money in case it was illegally exacted, we think the case is one within the first class of cases specified in the Tucker Act of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker Act, has been repeatedly sustained."

But it must be remembered that this right exists by virtue of the statute, and that in the Floyd Acceptances[62] the Supreme Court refused to hold the United States bound by the acceptance of bills of exchange by John B. Floyd, Secretary of War, and purchased by the plaintiffs before maturity and for a valuable consideration. The same rule applies to the states. A most interesting case illustrating the rule, and one which seems like a very harsh application of it, is that of Lewis v. State of New York.[63] This is a case in which the plaintiff brings suit for damages resulting from injuries received while a convict in the state penitentiary. The injury was due to his being compelled by the overseer to carry molten iron in a defective ladle, to

[62] 7 Wall. 666 (U. S.).
[63] 96 N. Y. 71.

which defect he had called the attention of the overseer. In justifying its decision in favor of the state, the Court of Appeals says: "It is now contended by the learned counsel for the appellant that the act of the overseer in compelling the claimant to use the defective ladle, after having been notified of its unsafe condition, was an act of the state and of gross and inexcusable negligence. It is apparent that even if this is so, the claimant must fail unless the doctrine of *respondeat superior* can be applied to the state, and the state made liable for the negligence or misfeasance of its agent, in like manner as a natural person is responsible for the acts of his servants. We are aware of no principle of law, nor of any adjudged case, which makes that application, except when the state, by its legislature, has voluntarily assumed it."

82. **Liability of municipalities and quasi-corporate bodies.**—The doctrine of non-suability except by consent does not hold with regard to municipal corporations, as one of the objects in creating them corporations is to enable them to sue and be sued, yet while it is now generally held that quasi-corporate bodies, as counties, may be sued without legislative consent, it has not always been so held. In Russell v. Men of Devon,[64] it was held that the action was not maintainable, as the Men of Devon were not a corporate body, and even in the United States a similar view was held. In Hamilton County v. Mighels,[65] which was an action for damages caused

[64] 2 Term. Reps. 667 (Eng.).
[65] 7 Ohio St. 109.

by the negligence of county commissioners, it was held that the action could not be maintained because there was no statute authorizing it. The reverse of this is now the general rule, and counties as well as cities are suable. That they are liable on their contracts and suable for the enforcement thereof admits of no doubt, provided their officials had authority to make such contracts.

But whether or not they are liable in tort depends upon the character of service in which the tort occurred. If the act is one which is being performed by the city or county in its capacity as sovereign, rather than in its capacity as a mere property-owner, it is not liable. Thus, in Askew v. Hale County,[66] which was an action brought for injuries due to the negligence of county officials in repairing a bridge, the court held that the county was not liable, because the county was an involuntary political unit for aiding the state in the administration of governmental business, and that as such political subdivision of the state it shared the immunity of the state. A like decision was reached in the case of Lorillard v. Town of Monroe.[67] We quote the following very clear discussion of the subject from Eastman v. Meredith,[68] which is a case where the plaintiff sues for injuries caused by the collapse of a negligently constructed floor of a town-house while the plaintiff, a voter, was attending a town meeting. After discussing several cases in which

[66] 54 Ala. 639.
[67] 11 N. Y. 392.
[68] 36 N. H. 284.

towns have been held liable as owners and managers of property held for profit or in the exercise of a special power, the court says:

"The case of the plaintiff can not be classed with any of those to which we have adverted. The question here is, whether a town is liable to the action of a citizen of the town who has suffered a special damage from neglect of the town to provide a safe place for holding the annual town meeting. The public duty relied on is not enjoined by express provision of any statute. If such a duty exists, it is implied from the general character and design of such quasi-corporations, and must depend on the general law applicable to all towns. Here is no contract, express or implied, between the state and the individual town, and no grant of any special power or privilege which can be supposed to have been voluntarliy accepted by the town upon condition of performing the public duty. Towns are involuntary territorial and political divisions of the state, like counties, established for purposes of government and municipal regulation. It is chiefly through this organization of towns that the people exercise the sovereign power of government; and the plaintiff's claim is for damages which he has suffered from neglect of the town to provide him a safe place for the exercise of his public and political rights as a citizen of the town and state."

In Buttrick v. Lowell,[69] the court refused to hold the city liable for damages caused by two policemen who assaulted and battered the plaintiff under circumstances which would not warrant any arrest. The court justified its decision on the ground that—

[69] 1 Allen 172 (Mass.).

"Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties, with which police officers and constables are intrusted, are derived from the law and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties the city or town cannot be held liable.

"Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as the agents or servants of the city."

83. **Non-liability for acts of health officers.**—In Gilboy v. Detroit,[70] the city was sued for damages due to the negligence of its board of health in allowing one infected with smallpox to go at large. The plaintiff was the proprietor of a boarding-house to which the infected person came and there became ill with smallpox, thereby causing great damage to the plaintiff's business. But the court held that the

[70] 115 Mich. 121.

universal rule is that such boards and officers are not acting for private but for public purposes; they represent the entire state through the municipality, and municipalities, in the absence of express statutes fixing liability, are not liable for the negligence of such officers and boards. A like conclusion as to non-liability of the city was reached in Maximilian v. Mayor,[71] which was an action for injuries caused by the negligence of the driver of an ambulance employed by the commissioners of public charities, who in turn were appointed by the mayor. This proposition is well established.

84. **Non-liability for acts of fire officials.**—The same principle as is applied to police and health officials holds in regard to fire officials. Therefore in the case of Hayes v. Oshkosh,[72] involving the question of the liability of the city for the loss of property set on fire by the negligent operation of a fire engine operated by the city fire department, it was held that the city was not liable. A like conclusion was reached in the case of Wilcox v. Chicago,[73] where damage was done to the plaintiff's carriage by the negligent driving of the wagon of a hook and ladder company. The same rule would apply to the blowing up of a building by dynamite where it was erroneously judged to be necessary in order to prevent the spread of a conflagration. Also the city was held not liable for the failure of the fire chief to order this done in a case where it would have prevented the spread of

[71] 62 N. Y. 160.
[72] 33 Wis. 314.
[73] 107 Ill. 334.

a conflagration, or to provide sufficient water with which to fight the fire.[74]

85. **Apparent conflict in authorities.**—But the above principle is not applied with entire consistency, for we find that in Missano v. Mayor,[75] which was an action brought to recover damages for the death of a child run over and killed by a horse attached to an ash cart of the street cleaning department, and negligently driven by an employee of that department, the court of appeals held the City of New York liable. The care of the streets is placed by the court in the category of functions which the city performs in its private or proprietary and not in its governmental or public capacity. But to the lay mind this function seems to be very closely allied to, if not a part of, the duty of the city to preserve the health of its citizens. But the court takes the opposite view, as will be seen from the following extract from its opinion:

"It is clear upon principle and authority that the City of New York, in the ordinary and usual care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual as distinguished from its governmental functions when it acts as a sovereign."

But to our mind the reasoning in the dissenting opinion of Judge Gray is more convincing:

"Duties imposed upon municipalities for the benefit of all citizens, in the exercise of the sovereign power, and which are to be performed by independ-

[74] Tainter v. Worcester, 123 Mass. 311.

[75] 160 N. Y. 123.

ent officers, who may take their appointment from the corporation itself, through the nomination of its executive agents, make of the officers servants of the public at large. They are not, then, the agents or servants of the municipal corporation; but they are public officers, agents or servants of the general public, and the corporation is not responsible for their acts or omissions, or for those of their subordinates. In appointing the officer, in obedience to an act of the legislature, it does so in pursuance of a duty imposed by law for the general welfare of the inhabitants, or of the community. This very explicit doctrine rests upon the basis of the distinction between the exercise by a municipality of powers which are delegated to it by the general government, to be exercised for the public welfare, and those which are conferred upon it for some especial benefit and advantage in its corporate capacity."

That the city is liable for negligence of its officers in the construction or repair of its pavements or sidewalks may be said to be settled by the decision of the Supreme Court of the United States in Barnes v. District of Columbia.[76] Yet this does not necessarily carry with it liability for the use of its streets by street-cleaning wagons any more than it does liability for their use by ambulances or fire engines. The question is of course one as to classification of functions with regard to their nature, and upon questions of this sort it is not surprising that there should be conflict in the point of view of those making the classification.

86. **Liability under maritime law.**—The admiralty courts will not, however, apply the rule of non-liabil-

[76] 91 U. S. 540.

ity which the state courts apply in the case of fire officials, but in a case where they have jurisdiction of the persons and subject-matter, they apply the rule of maritime law which holds the city liable for damages due to the negligent acts of its fire officials. Thus, in Workman v. Mayor of New York,[77] where the barkentine *Linda Park,* which was the property of the libellant, was injured by the steam fireboat *New Yorker* while moored to the dock at pier 48 in East River, the Supreme Court of the United States reversed the decision of the Circuit Court of Appeals holding the city not liable. The facts in the case established the negligence of the fireboat. In refusing to apply the rule of the court of the state of New York with respect to the liability of the city for the negligence of its officials, the court, speaking through Justice White, says:

"The proposition, then, which we must first consider may be thus stated: Although by the maritime law the duty rests upon courts of admiralty to afford redress for every injury to person or property where the subject-matter is within the cognizance of such courts, and when the wrongdoer is amenable to process, nevertheless the admiralty courts must deny all relief whenever redress for a wrong would not be afforded by the local law of a particular state or the course of decisions therein. And this, not because, by the rule prevailing in the state, the wrongdoer is not generally responsible and usually subject to process of courts of justice, but because in the commission of a particular act causing direct injury to a person or property it is considered, by the local decisions,

[77] 179 U. S. 552.

hat the wrongdoer is endowed with all the attributes f sovereignty, and therefore as to injuries by it done o others in the assumed sovereign character, courts re unable to administer justice by affording redress or the wrong inflicted.

"The practical destruction of a uniform maritime aw, which must arise from this premise, is made nanifest when it is considered that if it be true that he principles of the general maritime law giving elief for every character of maritime tort where the rongdoer is subject to the jurisdiction of admiralty ourts can be overthrown by conflicting decisions of tate courts, it would follow that there would be o general maritime law for the redress of wrongs, s such law would be necessarily one thing in one tate and one in another; one thing in one port f the United States and a different thing in some ther port. As the power to change state laws or tate decisions rests with the state authorities by vhich such laws are enacted or decisions rendered, t would come to pass that the maritime law afford- ng relief for wrongs done, instead of being general nd ever abiding, would be purely local—would e one thing to-day and another thing to-morrow. hat the confusion resulting would amount to the brogation of a uniform maritime law is at once atent. And the principle by which the maritime aw would be thus in part practically destroyed vould besides apply to other subjects specially onfided by the Constitution to the federal govern- nent. Thus, if the local law may control the mari- ime law, it must also govern in the decision of ases arising under the patent, copyright, and com- nerce clauses of the Constitution. It would result hat a municipal corporation, in the exercise of ad- ninistrative powers which the state law determines o be governmental, could with impunity violate the

patent and copyright laws of the United States or the regulations enacted by Congress under the commerce clause of the Constitution, such as those concerning the enrollment and licensing of vessels. This follows if a corporation must, for a wrong by it done, be allowed to escape all reparation upon the theory that, though ordinarily liable to sue and be sued, it possessed in the particular matter the freedom from suit which attaches to a sovereign state."

CHAPTER XI.

CONTROL OF COURTS OVER PUBLIC OFFICERS.

87. **Power to nullify acts of legislatures.**—Though the courts will not enjoin the passing of a statute or ordinance, they will, if it is beyond the power of the legislative body to pass such a law, nullify it by declaring it unconstitutional. The exercise of this power by the courts is very familiar and it is needless to attempt an exhaustive list of examples of its exercise. The classic case is that of Marbury v. Madison,[78] which is a case of the exercise of its power by the Supreme Court to nullify an act of Congress. In City of Clinton v. Phillips,[79] the Supreme Court of Illinois set aside an ordinance of the city of Clinton requiring druggists to make quarterly reports of their sales of spirituous liquors, giving the kinds and quantities sold and to whom sold. It was declared unconstitutional as "it is an invasion of the sanctity of private business, and ought not to be tolerated."

Also the Supreme Court of California, in the Matter of Ah You,[80] set aside an ordinance of the city of San Francisco imposing a maximum fine of $1,000 or six months' imprisonment, or both, for visiting a house of ill-fame. The reasonableness of the ordinance was brought before the court on a petition for

[78] 1 Cranch 137 (U. S.).
[79] 58 Ill. 102.
[80] 88 Cal. 99.

a writ of habeas corpus. The court says: "The act of which the petitioner was convicted is not enumerated among the crimes which are defined in the Penal Code, but is made an offense solely by virtue of the ordinance. The legislature has not deemed it necessary to prescribe any punishment therefor, and from the statutes which it has adopted upon kindred topics, the penalty allowed by the ordinance in question must be held to be not in harmony with its general policy. We are of the opinion that so much of the ordinance in question as permits a fine of one thousand dollars to be imposed as the penalty for visiting a house of ill-fame is unreasonable, and not in harmony with the laws of the state, and therefore void. The petitioner must therefore be discharged from custody."

88. **Courts will not enjoin passing of an ordinance.**—The court will not, as stated, enjoin the passing of an ordinance; for the mere act of passing an ordinance does not render the danger to anyone sufficiently imminent to warrant the intervention of the court, as the passage of an ordinance does not necessarily mean its enforcement. Until there is an attempt to enforce the will of the legislative body, life, liberty, or property are not placed in sufficient danger to call for the intervention of any extraordinary remedy. The legislative branch may furnish the remedy by repealing the law, or the executive branch by doing nothing, either of which is simpler than the remedy of the court. As said by the court in Harrison et al. v. City of New Orleans:[81] "The

[81] 33 La. Ann. 222.

mere voting on or passing the ordinance in question cannot per se do the plaintiff any possible injury. It will be time enough to complain, if it be a subject for complaint, when steps are taken or a beginning made to put the ordinance into actual execution."

89. **Courts slow to enjoin collection of a tax.**—The courts are also slow to enjoin the collection of a tax and will not do so unless there are circumstances which bring it within equity jurisdiction. They recognize the fact that the state must have revenue in order to perform the functions of government, and will not, except in an extreme case, throw impediments in the way of its collection. As said by the Supreme Court of the United States in Dows v. Chicago: "It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers upon whom the duty is devolved of collecting the taxes may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complain-

ant, before the aid of a court of equity can be invoked. In the cases where equity has interfered, in the absence of these circumstances, it will be found, upon examination, that the question of jurisdiction was not raised, or was waived." But if convinced that the tax is not for a public purpose, the courts will, at the suit of a taxpayer, enjoin its collection or the issue of bonds to be paid out of the proceeds of taxation.[82] If the bonds have been already issued, courts will refuse to recognize their validity in a suit to enforce payment, or payment of the interest on them.[83] To do this, it is of course necessary for them to declare unconstitutional the act providing for the taxation, and this they will do. They will also declare unconstitutional an act providing for a tax if for any other reason the legislature enacting it did not have the constitutional power to levy such a tax. This was decided by the Supreme Court of the United States in the classic case of McCulloch v. Maryland[84] practically a century ago and since then the power of the courts, both state and federal, to exercise such power has been admitted. The most notable recent exercise of the power was the enjoining of the Farmers' Loan & Trust Co. from paying certain taxes levied under what is known as the Income Tax Law of 1894, on the ground that said law was unconstitutional in so far as it attempted to levy a direct tax without regard to the provision of the Constitution requiring the apportionment of direct

[82] Lowell v. City of Boston, 111 Mass. 454.
[83] Loan Association v. Topeka, 20 Wall. 655 (U. S.).
[84] 4 Wheat. 316 (U. S.).

axes in proportion to the population of the states.[85] t was held that taxes which are levied on the income f real estate and of personal property are direct axes.

90. **Control of officers by certiorari.**—Where offi-ers are empowered to proceed in a summary way or n a mode unknown to the common law, and no other nethod of revision is specially provided, certiorari -ill lie.[86] It will issue to review the appointment and roceedings of commissioners to value land taken for orporate purposes and to appraise damages by spe-ial statutory authority; the laying out of a road nder an act incorporating a turnpike company;[87] ne acts of commissioners who have passed upon ne question of damages to an abutting owner by a hange in the grade of a street but have failed to eport in his favor.[88] It will also lie "in proceedings f a summary character by bodies exercising quasi-udicial functions which do not admit of any other emedy for a direct review, clear violations of law in oing those things which are within the jurisdiction f the body to do in a legal manner."[89] It will issue to eview the actions of inferior tribunals in proceed-ngs against insolvents or fraudulent debtors.[90] But s a means of reviewing the proceedings of an infe-or tribunal, the statutes of most states have now rovided for substituting for it an appeal.

[85] Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601.
[86] Campbell v. Strong, Fed. Cas. No. 2367*b*; but see State of Georgia v. anton, 6 Wall. 50 (U. S.), LEADING ILLUSTRATIVE CASES.
[87] State v. Newark & Pompton Turnpike Co., 2 N. J. L. 318.
[88] Stewart v. Hoboken, 57 N. J. L. 330.
[89] State v. Lawler, 103 Wis. 460.
[90] People v. Daly, 67 Barb. 325 (N. Y.).

91. **By habeas corpus.**—Where a public officer has the custody of a person by any other authority than the order or sentence of a court having jurisdiction, the right of such officer may be looked into by means of a writ of habeas corpus commanding him to bring the prisoner into the court issuing the writ and show by what authority the prisoner is detained, and if this showing is not satisfactory, he is ordered to release the prisoner. This is a compulsory, not a discretionary, writ. By the fourteenth section of the Judiciary Act of September 24, 1789, it is provided "that either of the justices of the Supreme Court, as well as the judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial by some court of the same, or are necessary to be brought into court to testify."

In accordance with this, the federal courts do not interfere with the jurisdiction of the state courts, and the reverse is also true. If, however, a state officer has custody of a prisoner whom the federal and not the state courts have jurisdiction to try, the federal court having jurisdiction will issue a writ of habeas corpus commanding the said state officer to bring the prisoner into the court issuing the writ and may enforce obedience.[91] In the case just cited

[91] In re Neagle, 135 U. S. 1; also see In re Sawyer, 124 U. S. 200, Leading Illustrative Cases.

ll be found a review of the amendments of 1833, 2, and '67 to the Judiciary Act of 1789 with regard the power of the federal court to issue the writ id the causes which led to said amendments. In belman v. Booth,[92] the Supreme Court of the nited States reversed the decision of the Supreme ourt of Wisconsin, holding that one of its judges ight by writ of habeas corpus annul the proceedgs of a Commissioner of the United States and disarge a prisoner committed by him for an offense ainst the laws of the United States, and in United ates v. Booth, argued with the above, reversed a cision of the same court holding that it might disarge a prisoner by habeas corpus proceedings who d been found guilty and sentenced by a United ates District Court. The Supreme Court of the nited States, through Chief Justice Taney, says:

"We are sensible that we have extended the examition of these decisions beyond the limits required any intrinsic difficulty in the questions. But the cisions in question were made by the supreme judial tribunal of the state; and when a court so elted in its position has pronounced a judgment nich, if it could be maintained, would subvert the ry foundations of this government, it seemed to the duty of this court, when exercising its appelte power, to show plainly the grave errors into hich the state court has fallen, and the consequences which they would inevitably lead. But it can rdly be necessary to point out the errors which llowed their mistaken view of the jurisdiction they ight lawfully exercise; because, if there was any

[92] 21 How. 506 (U. S.).

defect of power in the commissioner, or in his mode of proceeding, it was for the tribunals of the United States to revise and correct it, and not for a state court. And as regards the decision of the district court, it had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings nor the validity of its sentence could be called in question in any other court, either of a state or the United States, by habeas corpus or any other process."

92. **Control of officers by mandamus.**—As we have already had occasion to notice, the court will by mandamus compel the performance of ministerial duties by public officers. Mandamus will not, however, be issued to compel the performance of an unlawful act,[93] or an act which has become impossible of performance,[94] or to compel the performance of an act forbidden by an injunction of a court of the same state.[95] It will issue out of a federal court to compel the performance of an act notwithstanding the fact that it has been forbidden by an injunction issued by a state court.[96] As said by the Supreme Court of the United States in the case last cited: "Viewed in any light, therefore, it is obvious that an injunction of a state court is inoperative to control, or in any manner to affect, the process or proceedings of a circuit court, because in their sphere of action the circuit courts are wholly independent of the state tribunals." In this case a mandamus was issued commanding the

[93] People v. Fowler, 55 N. Y. 252; also see State ex rel. Carpenter v. Supervisors Town of Beloit, 21 Wis. 282, LEADING ILLUSTRATIVE CASES.

[94] County Comrs. v. Jacksonville, 36 Fla. 196.

[95] Ohio, etc., Ry. Co. v. Comrs., 7 Ohio St. 278.

[96] Riggs v. Johnson County Commissioners, 6 Wall. 166 (U. S.).

county commissioners to levy a tax notwithstanding the fact that they had been forbidden to do so by an injunction of the state court. Mandamus will issue to compel the proper officers to hold an election[97] or to compel the attendance of officers whose duty it is to act with a board in electing another officer.[98] To compel the performance of ministerial duties affecting the public, any taxpayer has sufficient interest to enable him to apply for the writ.[99] Though this is the general rule, there is some conflict.[1]

Where the interest is merely private, the applicant must show some special interest not shared by all the other members of the community.[2] Where a writ of mandamus has been issued, a change in the personnel of the board to whom it is directed will not abate the writ.[3] But it has been held by the same court that a writ issued to the head of a department would abate on his death or retirement from office, for the reason that having had no opportunity to be heard, the successor to the office, against whom no judgment had been issued, could not be adjudged in default.[4]

93. **Control by prohibition.**—The writ of prohibition is a discretionary writ for the purpose of preventing further proceedings by an inferior judicial

97 Atty. Gen. v. Com. Council, 78 Mich. 545.

98 Wampler v. State, 148 Ind. 557.

99 Union Pacific Ry. Co. v. Hall, 91 U. S. 343; also see Brown v. Russell, 166 Mass. 14, LEADING ILLUSTRATIVE CASES.

1 Wellington et al., Petitioners, 16 Pick. 87 (Mass.).

2 People v. Walker, 9 Mich. 328.

3 Commissioners v. Sellew, 99 U. S. 624; Thompson v. U. S., 103 U. S. 480; Murphy v. Utter, 186 U. S. 95.

4 Secretary v. McGarrahan, 9 Wall. 298 (U. S.); U. S. v. Boutwell, 17 Wall. 604 (U. S.).

or quasi-judicial tribunal. It lies not only where an inferior tribunal is proceeding to adjudicate a matter over which it has no jurisdiction, but also to prevent the exercise of unauthorized power in a case where the tribunal has jurisdiction over the subject-matter of the case.[5] It is a proper remedy to prevent further proceeding by an inferior tribunal after an appeal has been taken to a higher court.[6] It is within its limited sphere analogous to injunction in its much wider sphere.

The nature and purposes of the writ have been very clearly stated by Chief Justice Shaw in Connecticut River Ry. Co. v. County Com'rs.[7] In this case the relator applied for a writ of prohibition to prevent the county commissioners from taking his land for a passenger station in accordance with a statute making no sufficient provision for paying the owners. His contention was that the statute was unconstitutional and hence conferred no jurisdiction on the commissioners. The Chief Justice says:

"A writ of prohibition, issuing from the highest court of common law, is the appropriate remedy to restrain a tribunal of peculiar, limited, or inferior jurisdiction from taking judicial cognizance of a case not within its jurisdiction. * * * The fact that the remedy by petition for a writ of certiorari will be open to the land-owner, after final judgment, affords no reason why the court should now refuse a writ of prohibition, and thereby put the petitioner to the

[5] Appo. v. People, 20 N. Y. 531; see also State Railroad Tax Cases, 92 U. S. 575, Leading Illustrative Cases.

[6] Fite v. Black, 85 Ga. 413.

[7] 127 Mass. 50.

uble, expense, and delay of a trial before a tri-
nal which has no jurisdiction of the case, and to
ose jurisdiction the petitioner has objected at the
tset of the proceedings. * * * The fact that an
ent of the commonwealth is the adverse party, in
e proceedings before the county commissioners,
ords no reason for refusing the writ. A writ of
ohibition, like a writ of mandamus or of certiorari,
properly sued out in the name of the crown or the
ate; the only necessary defendant is the tribunal
ose proceedings are sought to be restrained, con-
olled, or quashed; and there is no class of cases
ere the authority to issue writs of prohibition is
tter settled than in those of courts martial, eccle-
astical courts, or inferior courts of common law,
suming to take cognizance, in excess of their juris-
ction, of criminal prosecutions."

CHAPTER XII.

TERMINATION OF OFFICIAL RELATION.

94. **Expiration of term.**—The most natural and ordinary way for the official position of an officer to terminate is by the expiration of the term for which he was chosen. This term may be either for life, for a definite number of years, or until his successor shall have been duly elected and qualified. This latter proviso, in order to avoid an interregnum, is sometimes placed in the constitution or statutes and sometimes implied by the law.[8] If, however, an officer seeks to avail himself of this proviso to hold longer than he is lawfully entitled to office, his right may be tested by quo warranto proceedings.

95. **Death.**—In the case of a single officer it is clear that his official relation is terminated by his death, but in the case of a board consisting of three or more members the death of members will not affect the status of those remaining, and, provided a majority remain, it will not affect their power to act.[9] It is the policy of the law to guard against the failure of a public service, and where this end can be accomplished by majority action it is allowable.

96. **Abolition of office.**—As an office is neither a contract nor a property right, it may, if not protected by the constitution, be abolished by the legislature.

[8] State v. Bulkeley, 61 Conn. 287.
[9] People v. Palmer, 52 N. Y. 83.

here this is done, the official relation of the officers of course terminated. It was decided by the Su-reme Court of the United States in Butler v. Penn-lvania[10] that public offices do not come within the ovision of the Constitution of the United States ainst the impairment of the obligation of contracts, d that the legislature might decrease the pay or olish the office of canal commissioners, without bjecting the state to a suit for damages.

97. **Abandonment of office.**—Though the state ay abolish the office and thus end the term of an ficer, the right of the officer to bring the official lation to an end by abandoning his office—i. e., ceas-g to perform the duties of it—is not so universally mitted. The state may, if it chooses, compel him mandamus to continue until the end of his term to erform the duties of the office.[11] At any rate, a eglect of duty is generally considered merely a cause r removal and not ipso facto a termination of the lation. A persistent neglect of duty indicating an bandonment would be proper grounds for quo war-nto proceedings where no other more convenient ethod of removal is provided.

98. **Loss of qualifications.**—Where residence ithin the district is one of the qualifications for olding office, a removal from the district for a con-derable length of time will be a sufficient cause for moval from office, and if the change of residence is rmanent it will create a vacancy.[12] Thus, where

[10] 10 How. 402 (U. S.).
[11] People v. Williams, 145 Ill. 573.
[12] Yonkey v. State, 27 Ind. 236.

a county officer leaves the county with his family, with the intention not to return, or goes to another state with the intention of there making it his home, he is held to have vacated his office.[13] Voluntarily enlisting in the military service of the United States will produce the same result.[14] When a maximum age limit is provided, as for army officers, the statute may provide that the passing of this limit will operate automatically to create a vacancy or merely make it a sufficient cause for retirement, as in the case of justices of the Supreme Court of the United States. Where a public officer becomes insane, this does not, apart from statutory provision, render the office vacant, but is of course sufficient cause for removal, just as it would, if known in advance of his taking the office, have been sufficient to disqualify him. This is in accord with what has been called the "common political law."[15] In case of officers removable only by impeachment, where the only grounds of impeachment are "high crimes and misdemeanors," the question of the removal because of the officer's becoming insane is a very interesting one. The question arose in the case of Justice Pickering, but, before action was taken, he died. Where the appointing power has also the power of removal, the question is a simple one, as insanity is recognized as sufficient cause for removal.

99. **Removal at will.**—The power to appoint does not necessarily carry with it the power to remove

[13] Mechem, Public Officers, § 439.
[14] State v. Allen, 21 Ind. 517.
[15] Cushing's Leg. Assemblies, § 56.

This is of course the case where other provision is made for removal, as in the case of federal judges, who are appointed by the President, but may be removed only by impeachment. It is true also of officers appointed for a fixed term. But where the nature of the service is advisory, as a member of a cabinet, or confidential, as a private secretary, the office is generally considered as one to be held at the discretion of the appointing power, and he may remove without assigning any cause for so doing. Thus, in the Matter of Hennen,[16] the Supreme Court of the United States sustained the removal of a clerk by a circuit judge, notwithstanding the fact that the judge stated "unreservedly that the business of the office had been conducted promptly and uprightly and that in appointing Mr. Winthrop to succeed him, he had been actuated purely by feelings of kindness towards one whom he had long known, and between whom and himself the closest friendship had ever subsisted. And that, as his capacity to fill the office cannot be questioned, he felt that he was not exercising any unjust preference, in bestowing on him the appointment."

100. **Removal for cause.**—At common law, an officer was removable for cause only and was entitled to a hearing.[17] Also there are decisions in this country holding that, in the absence of statutory provisions, the common law rule applies to an officer of a municipal corporation.[18] Where the constitution

[16] 13 Pet. 230 (U. S.).

[17] Baggs Case, 11 Coke 93*b* (Eng.); Rex v. Coventry, I Lord Ray. 391 (Eng.).

[18] State v. Common Council, 9 Wis. 229.

confers upon the appointing power the authority to remove at will officers whose term is not fixed by law, this is held by implication to make removable for cause only those whose term is fixed by law.[19] And where a statute requires that officers appointed for a fixed term can be removed for cause only, it cannot be evaded by a failure to fix the term, whether the failure be due to design or negligence, and a removal under these circumstances, except for cause, is void.[20] Where the term is during good behavior, the officer cannot, even though he misbehave, be removed without notice and hearing.[21] Where "notice" is provided for in the statute, it implies an opportunity to be heard and the taking of testimony, but "explanation" does not.[22]

101. **Sufficiency of cause.**—Where the statute provides that an officer is removable for cause only, without specifying any particular act or omission, it has been held that the cause "is to be some dereliction or neglect of duty, or incapacity to perform the duties, or some delinquency affecting his fitness for the office. The cause assigned should be personal to himself, and implying an unfitness for the place."[23] The determination of the question of sufficiency of cause is in its nature judicial, but it is not unusual for the constitution or statutes to provide for its determination by the executive.[24] So though the proceeding

[19] People v. Jewett, 6 Cal. 291.

[20] State v. Police Com'rs., 88 Mo. 144.

[21] Page v. Hardin, 8 B. Monroe 648 (Ky.).

[22] People v. Thompson, 94 N. Y. 451; also see Dullam v. Willson, 53 Mich 392, LEADING ILLUSTRATIVE CASES.

[23] People v. Fire Com'rs., 72 N. Y. 445.

[24] Mechem, Public Officers, § 457.

s judicial in its nature and reviewable by certiorari, a statute vesting in the governor the determination of the question whether cause exists for the removal of county officers is not unconstitutional as conferring judicial functions upon an executive officer, since the power of removal is also political in its nature.[25] Where certain causes are enumerated, this impliedly excludes the removal for other causes, and if an officer is removed without the notice and hearing required in case of the enumerated causes, it will be presumed that he was removed for other causes.[26]

102. **Suspension.**—Although the power of removal and the power to suspend are intimately related, the former does not necessarily include the latter.[27] The reason for this is that when an officer is removed a vacancy is created, the filling of which may be compelled by mandamus, but this is not true of a suspension, which might thus be used for the purpose of preventing the performance of the duties of the office and so defeating the aim of the people or legislature in creating the office. As said by the Supreme Court of New Jersey in the case of State v. Jersey City:[28] "Suspension from the duties of the office creates no vacancy; the seat is filled but the occupant is silenced. The charter vests no such power in the council; it would be extraordinary if it did. The power is to expel, not to suspend."

A like conclusion was reached by the Court of Appeals of New York in the case of the suspension

[25] People v. Stuart, 74 Mich. 411.
[26] Shurtleff v. United States, 189 U. S. 311.
[27] Metsker v. Neally, 41 Kan. 122.
[28] 25 N. J. L. 536.

of an officer by a board authorized to remove him. Justice Peckham, delivering the opinion of the court, said: "There is nothing in the nature of the power to remove or expel which necessarily and in all cases would include a power to suspend; for in some instances the power to suspend would seem to be very different in its nature from the power to remove, and not necessarily a minor power included in the power of expulsion. Whether the power to remove includes the power to suspend must depend, among other things, upon the question whether the suspension, in the particular case, would be the exercise of a power of the same inherent nature as that of removal, and only a minor exercise of such power, or whether it would work such different results that no inference of its existence would be indulged in, based only on the grant of the specific power to remove."[29] There are decisions which conflict with this view,[30] and the Supreme Court of New Hampshire, in Shannon v. Portsmouth,[31] says, with a degree of positiveness bordering upon dogmatism, that "it does not seem to require any argument to show that the power to remove must include the power to suspend." But the rule laid down by the New Jersey and New York courts in the cases just cited is in accord with the weight of authority in this country.

103. **Impeachment.**—Removal by impeachment is provided for in the Constitution of the United States and the constitutions of the various states. Article I,

[29] Gregory v. Mayor, 113 N. Y. 416.
[30] State v. Lingo, 26 Mo. 496.
[31] 54 N. H. 183.

§ 2, chapter 5, of the former vests in the House of Representatives "the sole power of impeachment," and in the Senate "the sole power to try all impeachments," and when sitting for this purpose the Senate "shall be on oath or affirmation"; that when the President of the United States is tried, the Chief Justice shall preside; that the concurrence of two-thirds of the members present shall be necessary to a conviction; and in § 3, chapter 6, that judgment "shall not extend further than to removal from office and disqualification to hold any office of honor, trust, or profit, under the United States." If we substitute the word "governor" for "President," we find almost identical provisions in the state constitutions, except that in New York and some other states the judges of the Court of Appeals sit with the senators as a court for the trial of impeachments. When the governor is being tried, the lieutenant-governor, being an interested party, is not allowed to sit in the court. After articles of impeachment have been filed against a judicial officer, he is not allowed to exercise his office until he shall have been acquitted. The case of Andrew Johnson is the only attempt to remove a President of the United States by impeachment, and it is fortunate that in this case a sense of duty and respect for law triumphed over intense partisanship. As a means for removing judges, impeachment has been pronounced by many a dead letter, but it was very effective in the case of Judge Archbald of the Commerce Court.

104. **Recall.**—The method of removing public officers by a popular referendum denominated the recall

has already been considered as applied to judges; and most of the reasons there urged in opposition to it hold as regards other than judicial officers, though not with the same force.

105. **Resignation.**—The resignation of a public officer may be either express or implied. When the former it may be either oral or written, and need not be under seal even though the statute requires the appointment to be under seal.[32] When the resignation is by implication, as in the case of accepting an incompatible office, or where residence is necessary, a permanent change of residence, the right to the office may be regarded as forfeited; and the acceptance of the resignation may also be by implication, as by regarding the office vacant and appointing or electing another to the office.[33] In order to warrant an implication of resignation from non-user, it must be total and complete:[34] "Non-user may be so greatly prolonged, especially where it is accompanied with other acts, as to indicate conclusively an abandonment of the office; and in that case no removal or judicial declaration is necessary."[35]

106. **Acceptance of resignation.**—Whether the resignation is express or implied, the common law rule is that it must be accepted by the appointing power in order to sever the official relation;[36] but as stated above, the acceptance may be either express or

[32] Gilbert v. Luce, 11 Barb. 91 (N. Y.).

[33] Phillips v. Boston, 150 Mass. 491.

[34] People v. Green, 5 Daly 254 (N. Y.); Page v. Hardin, 8 B. Monroe 648 (Ky.).

[35] Throop, Public Officers, § 422.

[36] Regina v. Lane, 2 Ld. Ray. 1304 (Eng.).

by the appointment of another to the office. The American cases are conflicting. In United States v. Wright,[37] Justice McLean laid down the doctrine that a public officer may resign at pleasure, without the consent of the appointing power. In his opinion in the above case, which was an action in the circuit court on the official bond of a collector of internal revenue in which the defense was that the breach occurred after the collector had presented his resignation, the Justice said: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the executive to compel him to remain in office. It is only necessary that the resignation be received to take effect, and this does not depend upon the acceptance or rejection of the resignation by the President. And if Fogg had resigned absolutely and unconditionally, I should have no doubt that the defendant could not be held subsequently as his surety." This doctrine has been followed by the courts of New York, Indiana, Iowa, California, Nevada, Virginia, and Nebraska. But the courts of the other states refuse to follow this doctrine, and it has been overruled by the United States Supreme Court in the case of Edwards v. United States.[38] After reviewing the English decisions, Justice Bradley, delivering the opinion of the court in this case, says: "In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices and, in some states,

[37] 1 McL. 509 (U. S.).
[38] 103 U. S. 471.

with regard to offices in general, may have obtained; but we must assume that the common law rule prevails unless the contrary be shown." Which view will be taken, depends of course upon the view taken of the obligation to accept a public office. Those who answer this in the affirmative are of course driven to the conclusion that a resignation does not sever the official relation until accepted by the proper authority for it would be a travesty upon logic to say that one may be compelled by mandamus to accept an office, if the officer may immediately thereafter tender his resignation and by so doing render the office vacant.

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QUIZ QUESTIONS

PUBLIC OFFICERS AND ELECTIONS

(The numbers refer to the numbered sections in the text.)

1. What is meant by the term "administrative law," and of what does it treat?
2-3. In distinguishing between an office and an employment what questions must be determined? Why is the distinction important?
4. State whether the right to hold office is a property right.
5. Under what authority are federal, state, and municipal officers elected? By what authority do they hold their respective offices, and under what supervision must they perform their duties?
6. Who are public officers? Give specific instances.
7. Into what three general classes are public officers divided in the modern law?
8. In what manner may incumbents properly occupy their respective offices?
9-10. What methods are pursued to bring before the elective body the names of the proposed candidates, and of which of the several methods do you approve?
11. To what extent have the several states power to determine who may vote for domestic officers?
12. Define and explain the provisions of what are known as restrictive laws.
13. What restrictions, if any, are imposed upon the states when prescribing qualifications of officers?
14. State the constitutional restrictions upon minority representation and cumulative voting.

15. Distinguish between majority and plurality in voting.
16. Who determines the form of the ballot, and the manner in which the ballot shall be cast?
17. A, being an illiterate, desires to cast his ballot; he has determined for whom to vote. Upon arriving at the polls, to whom should he apply for assistance to enable him to cast his ballot?
18. What are the duties of election commissioners?
19. The canvassing board refuses to perform its duties. What remedy may be invoked to compel it to do so?
20. To what extent may the legislature regulate the requirements for a valid election?
21-22. Compare the advantages and disadvantages of election and appointment of public officers.
23. Who may exercise the power of appointment and under what circumstances may such power be exercised?
24. The mayor of a city fails, within a reasonable time, to appoint a chief of police. May he be compelled to do so, and if so, by what remedy?
25-26. By what evidence should the appointee be able to establish his right to hold his office?
27-28. How may the title of one claiming to hold office be called into question and determined?
29-30. When and under what circumstances may vacancies in elective offices be filled by appointment?
31. Who may determine when a vacancy in an office exists?
32-33. A person is duly elected or appointed to an office. What further, if anything, is necessary for him to do before entering upon the duties of his office?
34. Burns, a citizen of the United States, is appointed minister plenipotentiary to France, goes to Paris with his family and remains there as such for a period of years, during which time a son is born to him. Would such son be eligible to the office of President of the United States?
35. Are there any qualifications touching the age of office holders, either elective or appointive? If so, state what they are.
36. What are the requirements as to citizenship when one

seeks an office, whether elective or appointive? Distinguish between residence and citizenship.

37. Is the privilege of voting a right or a license?

38-40. When the privilege of voting is granted, upon what is it based, and to what extent do age, sex, property, educational or religious qualifications affect the granting of it?

41. Under what circumstances may an officer, either elective or appointive, become disqualified by reason of his own acts, after taking office?

42. Under what circumstances may the legislature prescribe the necessary qualifications and duties of appointive or elective officers?

43. A is elected to the office of constable in the County of B; he qualifies and enters upon the duties of his office; soon thereafter it becomes apparent that he does not comprehend and is unable to read and write the English language. May he be dispossessed of office and the office declared vacant for these reasons?

44-45. McGuire is judge of the county court; during his incumbency he is convicted of the crime of grand larceny. Would this afford a sufficient ground for declaring his office vacant and placing another in his stead?

46. Under what circumstances does one become a de facto officer?

47. So long as one remains a de facto officer, what effect in law is given to his acts? Why?

48. What elements must exist in order to constitute one an officer de facto?

49. Wherein do the powers, rights and duties of an officer de facto differ from those of an officer de jure?

50. Upon what provisions is the compensation of officers based and how may they proceed to enforce payment?

51. What effect, if any, would the discontinuance of the office or lawful discharge of the officer have upon his right to recover compensation?

52. What is meant by impeachment and under what circumstances and by what authority may this power be exercised?

53. May officers assign their salaries? If so, to whom and upon what consideration?

54. What remedy has the assignee of the salary of an officer from whom such assignee desires to collect by process of law?
55. In the absence of constitutional provision, has a municipal government power to promise and pay to its officers money not earned, commonly known as pensions or awards?
56. To what authority should we apply to determine the powers of officers when they are not specifically set forth in the articles of municipal incorporation or defined by statute?
57. How is the matter of jurisdiction apportioned? What is meant by jurisdiction of the subject matter? Jurisdiction of the person named?
58. What will disqualify a judge from sitting in a particular case?
59. Which branch of the government ultimately exercises the power of finally passing upon the acts of the several other branches?
60. Where it is provided that whatever action is to be taken shall be taken by a board or committee, may such action be taken by a majority of members thereof individually, when not convened in meeting?
61. What is meant by the expression, "Everyone is presumed to know the law," and what application has it to persons dealing with public officials?
62. Distinguish between judicial and ministerial duties.
63-64. How may one determine whether the duties to be performed by an officer are judicial, ministerial, or discretionary?
65. A has certain property in the County of Cook and State of Illinois; his personal safety and that of his property are threatened by mob violence; he calls upon the sheriff for protection; this the sheriff fails to afford him. What remedy, if any, has A?
66. Distinguish between the liability which may attach to officers ministerial and officers judicial in the performance of their several duties.
67. In case a judge assumes to act where he has not jurisdiction of the subject matter, does he incur personal liability? If so, to whom, and what is the remedy?

68. (a) A court of limited jurisdiction determines a case not within its jurisdiction. Has the injured party any remedy other than that of appeal or review? (b) A court issued an injunction against A; A violated such injunction; and the court instituted proceedings against A for contempt; A then pleads that the court did not have jurisdiction of the subject matter. Is this defense available?
69. In cases where a judicial officer cannot be held liable to the party injured, though guilty of a breach of duty, who may call him to account?
70. Discuss and explain the distinction between impeachment and recall of judicial officers.
71. Define an administrative officer, and state under what circumstances he may become liable in an action at law for wrongful acts committed by him as such officer.
72. What presumption obtains with reference to the acts and doings of a quasi-judicial body?
73. To what extent will discretion, honesty, and fairness exercised by an officer protect him from liability?
74. Under what circumstances may a ministerial officer be guilty of malfeasance, misfeasance, and nonfeasance? Explain fully and state reasons.
75. (a) When will a writ of mandamus lie to compel an inferior officer to perform a specific duty imposed upon him by law? (b) Will a writ of mandamus ever lie to compel a superior officer, e.g., a judge of a court of general jurisdiction, to perform his duties?
76. State under what circumstances a superior officer may become liable for the tortious acts of those under his direction.
77. McGinty, clerk of a court of record, at the instance of Jones, knowingly makes a false entry on his records to the loss and damage of Robinson. What redress has Robinson?
78. To what extent, if at all, is a public officer personally liable upon contracts made by him in his official capacity?
79. Sheriff A, acting under a writ, fair upon its face, levies upon the property of B and disposes of the same at public vendue; the judgment having been obtained by fraud is

afterwards set aside upon motion of B. May B maintain an action against Sheriff A?

80. To what extent are members of legislative bodies personally liable, at law or in equity, to persons claiming to be injured by the enactments of such bodies?

81. (a) A has a claim against the state in which he lives for services rendered to such state; he brings an action against the state at common law. What defense, if any, ought the state to interpose? (b) Explain the doctrine of *respondeat superior* in so far as it applies to officials in public positions.

82. Jones is one of the fire marshals in the City of Chicago; in responding to a call he negligently runs upon and over Robinson; Robinson brings his action in tort against the city. May he recover?

83. An innkeeper receives a guest and affords him accommodations. The morning following the guest displays the symptoms of a contagious disease, which becomes known to the other guests of the inn, whereupon they seek other quarters. It develops that the guest had been exposed to contagion, had been examined by the health officer of the city in which the inn was located, and had been dismissed as safe. The innkeeper brings an action against the city health officer. May he maintain such an action?

84. Is a municipality liable for damages to an individual resulting solely from a mistake in the exercise of judgment on the part of one of its officers?

85. From your reading and consideration of the text and of the cases cited in support thereof, what do you determine to be the weight of authority with reference to the liability of municipal corporations for the tortious acts of their minor officials?

86. From the weight of authority do you find that any different rule has been applied in the federal courts from that which obtains in the state courts?

87. The legislative body proposes to pass an act which, it is claimed, is unconstitutional. May the person so claiming obtain judicial decision upon the constitutionality of this proposed act before it becomes a law?

88. To what extent will courts entertain proceedings to enjoin

the passing or enforcement of any particular law or ordinance?

89. State a case in which you would advise your client that he could maintain a bill to enjoin a municipality from the collection of taxes claimed by it to have been lawfully levied.
90. Explain the action of certiorari as applicable against public officers.
91. A sheriff having custody of a person refuses to release him upon proper evidence being presented that the person so in custody has given good and sufficient bail which has been accepted by the proper authority. What remedy has such person to obtain his release from custody?
92. (a) Under what circumstances will mandamus lie to compel the performance of acts purely judicial? (b) In general, what is the liability of the successor in office for the unlawful acts of his predecessor?
93. Define the writ of prohibition. State when, under what circumstances, and for what purposes it will be issued?
94. A justice of the peace is elected for a certain term of years and to serve until his successor is duly elected and qualified; at the expiration of his term of office no election is held; he still continues to administer his office. Will quo warranto lie to oust him?
95. A board of health consists of five members; one of them becomes insane, another dies. May the remaining three still exercise the functions of the board?
96. A is elected school trustee for a three-year term; the township, by vote, abolishes this office at the end of his second year. May A maintain an action to recover his salary for the remainder of his term?
97. Suppose an officer wrongfully neglects to perform the duties of his office to such an extent that the public suffers therefrom. What is the remedy?
98. Under what circumstances may an officer, having duly qualified and entered upon the duties of his office, become disqualified?
99. The President of the United States appoints Smith Secretary of the Interior; Congress concurs; Smith qualifies and enters upon the duties of his office; after some lapse

of time he becomes personally distasteful to the President who thereupon orders his removal from office and declares his office vacant. Is Smith bound to obey?

100. The mayor of a city appoints Jones fire marshal; the ordinance provides that a fire marshal shall hold his office for a term of two years; at the expiration of eighteen months the mayor arbitrarily orders Jones to quit his position and appoints another in his stead. Is Jones legally bound to step aside and allow such other to supersede him?

101. To whom or to what body, judicial or otherwise, is entrusted the duty of deciding upon the facts when it is sought to remove an officer for cause?

102. State whether it is within the power of those appointing an officer to suspend him, or whether they must declare his office vacant and appoint a new incumbent.

103. Where ought you to search to find the provisions governing the impeachment of public officers of high degree, as President, governor, etc.?

104. To what extent, if at all, do the provisions for recall of judges in force in several of the states, apply to the recall of other superior officers by referendum?

105. (a) Smith is duly elected secretary of state of the state of Illinois; he qualifies as such and enters upon the duties of his office; prior to the expiration of his term he desires to resign. How ought he to make his desire known and to whom? (b) May such resignation be shown by acts, or must it necessarily be expressed?

106. Who has authority to accept the resignation of a public officer, so as to determine his liability, upon his official bond or otherwise, for his acts as such officer, and in what way must acceptance be shown?

PART III

MUNICIPAL CORPORATIONS

BY

HENRY H. INGERSOLL, A.M., LL.D.*

CHAPTER I.

DEFINITION, EVOLUTION, CREATION, DISSOLUTION, ELECTION.

1. **Definition.**—The municipal corporation is a perfect public corporation, established under and by virtue of a sovereign act of legislation, uniting the people and land within a prescribed boundary into a body corporate and politic for the purposes of local and self-government, and invested with the powers necessary therefor. It is perfect as contradistinguished from the imperfect quasi-corporation, the county, district, or township, loosely organized under general law into a governmental agency for local administration. The municipal corporation is duly incorporated not primarily to enforce state laws, but chiefly to regulate the local affairs of the city, town, or district incorporated, by proper legislation and administration. Its object is public, though incidents connected with it may be of private nature, and

* Late Dean and Professor of Law, University of Tennessee College of Law; former Judge of Supreme Court of Tennessee. Author: "Public Corporations." Editor: "Barton's Suit in Equity." Contributor to legal encyclopedias and periodicals.

so far forth it is subject to the rules of liability controlling private corporations in the ownership of property, while the quasi-public corporation is of a private nature and object, with incidents only that are public.[1]

2. **Same subject—Establishment and nature.**—It is established under law; that is, it may be created by special charter enacted by the general assembly, without popular expression or action from the inhabitants of the territory; indeed, municipalities have been incorporated in direct antagonism to the expressed wish of the people. Or it may be voluntarily organized by the residents of a specified territory under general incorporation laws, enacted for such purpose, and authorizing the erection of a municipality by such means. When fully incorporated, both are equally perfect public corporations.

The incorporation of a municipality is a sovereign act of legislation, because in this country no other governmental power may create such a corporation. The power may not be delegated to any inferior body. The Federal Congress or the legislatures of the states alone possess this inherent creative power. The municipal corporation unites the people and the land, for neither people or land alone can constitute a municipality. Like a home, it requires a union of both elements—the land to give it body, and men to give it spirit and life. It has a prescribed boundary, because the limits of the municipality must be fixed and definite, that its territorial jurisdiction may not be uncertain or doubtful.

[1] McKim v. Odom, 3 Bland's Ch. 407 (Md.), LEADING ILLUSTRATIVE CASES.

The body is corporate and politic, because it is authorized and organized as an agency of the state for public uses and the public good.[2]

It is local, because, unlike the ancient cities, its powers and franchises are to be confined to its territorial limits, or lands immediately contiguous which are sometimes included for police and sanitary purposes.

It is for self-government, because the idea of foreign domination and exclusion of the people of a city or town from the administration of its internal affairs is repugnant to the fundamental conception of a municipality and the genius of American institutions. "Municipium" means a free town, and "municeps" a free citizen thereof, as those ideas were conceived in the Roman Empire.

A city not governed by its own laws and ordinances in its domestic concerns is not a municipality, either by history or etymology. It must have powers, or it cannot be a government—powers sufficient to authorize it to make its own laws and enforce them.

3. **Creation.**—The creation of municipal corporations within the limits of a state is the appropriate and exclusive function of the legislative power of that state, as explained above.

All governmental power of the state in our country inheres in the people of the state. They organize their government by a constitution, wherein they confer all legislative power upon the legislative department. The granting of any right, power, or franchise pertaining to public matters is obviously a func-

[2] People v. Ingersoll, 56 N. Y. 1, Leading Illustrative Cases.

tion of legislation, and cannot be within the province of the executive or judicial departments. A municipal corporation requires this grant of governmental authority as the essential condition of its being. The legislature has a discretion, uncontrolled by any constitutional limitations, to decide when a given locality has a sufficient number of inhabitants to entitle it to be incorporated as a city.[3]

The power to create a municipal corporation being vested in the legislature, implies the power to create it with such limitations as that body may see fit to impose, and to impose the same at any stage of the municipality's existence.[4]

Whether this power may be delegated by the legislature to either of the other coördinate departments of government, or the chief officers thereof, or any inferior officer or board therein, is a subject of apparent conflict in the decisions of the courts. But if the legislature authorize the formation of corporations by general law, it may empower courts or boards to do ministerial acts necessary to bring the corporations into being. It has also been held that the legislature may by special provision in the charter designate persons to issue a certificate of incorporation whenever it shall be satisfied that charter conditions have been complied with.

4. **Who may grant charters.**—The charters of municipal corporations may be granted by (a) the Congress of the United States; (b) the state legisla-

[3] Mattox v. State, 115 Ga. 212, 41 S. E. 709.

[4] Redell v. Moores, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740, 93 Am. St. Rep. 431; Berlin v. Gorham, 34 N. H. 266, Leading Illustrative Cases.

tures; (c) territorial legislatures, when authorized by Congress.

By the Federal Constitution, Congress is vested with "power to dispose of and make all needful rules and regulations respecting the territory belonging to the United States," and "to exercise exclusive legislation over such district as may become the seat of the Government of the United States." Under this authority, Congress has organized territories, and also chartered cities and towns within their boundaries.

The authority of the state legislatures to incorporate cities and towns as useful and indispensable agencies in the efficient administration of government is inherent and undoubted. All legislative power not granted to Congress is reserved to the states. As a necessary consequence, a state legislature may enact any law not forbidden by the state or Federal Constitution.

General assemblies have exclusive authority to create municipal corporations within the territorial limits of the states, in such manner and under such conditions as they may ordain. Under this exercise of inherent power have been created the municipal corporations of this country, and by these municipalities are administered all local municipal affairs of millions of people, involving an annual expenditure therefor of multiplied millions of dollars.

The territories possess no inherent or sovereign power. Such power as they have has been expressly granted to them by Congress. The general clause granting to the territorial legislature power over "all

rightful subjects of legislation" has been held sufficient to authorize the legislature to create municipal and other corporations within the territorial limits.[5]

5. **Legislative discretion.**—The exercise of the legislative functions of creating municipal corporations is wholly within the discretion of the legislature, and not subject to the control of the judicial power.

No power resides in any other department of the government to compel the legislature to enact any law; and no record is found of any case in which the aid of the courts was invoked to compel the legislative assembly to perform the constitutional duty so imposed upon it; nor has any case been reported in which a court has assumed to enjoin the corporation from assuming and exercising its franchises for the reason that the legislature had acted unwisely or had abused its discretion in granting the charter of incorporation. In states where there is no constitutional requirement for popular assent to the erection of a municipality, the power of the legislature to create a municipal corporation is absolute, and its discretion not a subject for inquiry or review by the courts.

The general assembly having, in the exercise of its undoubted constitutional power, decided that a certain village or hamlet ought to be incorporated, and enacted the requisite legislation to that end, all inquiry as to the legislative motive or intention, except as appearing from the act itself, is excluded

[5] So under the territorial organic act creating the territory of Colorado, the legislative assembly had power to establish a municipal corporation; Deitz v. City of Central, 1 Colo. 323.

from judicial consideration. If the act is constitutionally passed, the corporation is lawfully created, and that is an end of the matter. In some states, however, this power of creating involuntary municipal corporations does not exist in the legislature. This is true of Ohio, Massachusetts, and other states where there are constitutional provisions requiring the popular consent before the corporation can come into existence.

6. **Legislative power—How exercised.**—The legislature, unless specially directed or limited by the constitution, may, in its discretion, create corporations (a) by a special charter; (b) under general legislation authorizing the erection and organization of corporations if done in accordance with the popular will.

When a community desires a charter granting peculiar corporate privileges, or when a legislature thinks that a community should exercise corporate powers of a peculiar character, a special act called a "charter" is enacted for such community. This is peculiarly true in regard to our great cities, all of which exist under elaborate charters specifying the franchises, privileges, and powers of the corporation, the various departments and officers thereof, the duties and powers of each, and, indeed, all other things supposed to be necessary to the well-being of the corporate community which can be enacted into general law. This charter is the constitution of the municipality, which under it may enact by-laws or ordinances not inconsistent with it or with the law of the land.

7. **General charter.**—Municipal incorporation under general law is thus effected: Usually an act is passed prescribing the conditions upon which communities may become incorporated as cities, boroughs, or villages, and directing the steps to be taken to bring about the incorporation. Ordinarily, the provisions of such act are that, whenever the people residing within the boundaries containing a certain number of acres or square miles wish to become incorporated, they shall manifest that desire by public election; then the incorporation shall be effected by another election for choosing the necessary officers to manage and control the affairs of the municipality; whereupon the corporation shall become and be vested with certain powers, privileges, rights, and franchises specified and enumerated in the law. This organization usually takes place under the direction of some court or other existing agency of the state, and the result of the popular action, called a "charter," is properly recorded in the county office.

8. **Constitutional provisions.**—In some states the constitution provides that no corporations shall be created by special law. The language employed in the various constitutions is not uniform or identical, though the pivotal question in each case seems to be whether the general term "corporation" includes municipal corporations. In New York, Ohio, Kansas, and Nebraska, the decisions are to the effect that the word "corporation," or phrase "body politic and corporate," includes municipal corporations as well as private. But in New Jersey, Tennessee, and Rhode Island the holding is to the contrary.

In two states of the Union—Missouri and California—there is a constitutional provision that cities having more than one hundred thousand population may frame their charters for themselves, subject to certain restrictions and limitations expressed in the constitutional provision permitting it.

9. **Compliance with conditions.**—Substantial compliance with the requirements of the general laws for municipal corporations is essential, and is sufficient. The erection of a municipality is not academic, but political; and so the courts apply, in cases challenging the existence of the corporations, those larger rules of life and action which pertain to public affairs, and give substantial justice.

From these considerations of public policy have arisen a class of corporations known as corporations de facto. A corporation de facto is an existing corporation, defective in some essential feature of organization, but with a right to continued existence which may be impeached only by the state in a direct proceeding for that purpose.

To constitute a corporation de facto, there must be (1) a valid law authorizing incorporation; (2) an attempt in good faith to organize under it; (3) a colorable compliance with this law; and (4) an assumption of corporate powers.

10. **Corporations by implication.**—A corporation may be created by implication as well as by positive expression of the statute, *provided* there is a clear manifestation of legislative intention to constitute a corporation, or to invest it with corporate powers and franchises, or to recognize an existing body as

having the essential franchises and powers of a corporation. The usual words employed in a royal charter to constitute a corporation were: "We create, erect, found, incorporate," though words of similar import were held sufficient at the common law.

The rules of the common law in regard to corporations are of general application in this country, and wherever powers and privileges existing only under incorporation are conferred upon a body of persons, or upon the residents or inhabitants of a certain town or district, a corporation will be implied, to the end that the grant may not fail.

11. **Popular consent.**—Except in those states where the constitution requires popular assent to the creation of a municipality, it is not necessary that a special charter shall be assented to by the people. Since the municipality is created at the legislative discretion, and for the public welfare, as an instrumentality of government, it is not essential that the inhabitants or residents of the municipal boundaries shall give consent to the charter, as is required in the case of private corporations.

Where the incorporation is under general law, however, the popular assent is usually, if not invariably, required, as an essential feature of the incorporation, and a condition precedent thereto. The state says to its citizens in all its populous subdivisions: "It is permitted to you, but not required of you, to be incorporated as a municipality. Choose whether you will be so. If you vote to apply the provisions of the general incorporation law to yourselves, then and thereby you will become a municipal corporation."

12. **Validity—How tested.**—The validity of a municipal corporation is not subject to private or collateral attack, but is subject to impeachment only by the state in a direct proceeding for that purpose. The state has created the municipality as an agency of government. It may terminate that existence at will. But even the state has been held estopped from denying the validity of the incorporation where the municipality has existed and exercised corporate functions for a long time with the consent of the state; and, whenever the question of the validity of incorporation is raised, there is a strong tendency by the courts, in recognition of the *status quo* (existing condition), to uphold the validity and power of the municipality.

13. **Alteration.**—The legislature also has plenary powers, unless forbidden by the constitution: (a) to change the boundaries of municipal corporations so as to enlarge or decrease their territory; (b) to divide a municipal corporation into two or more separate municipalities; (c) to unite two or more separate municipal corporations into a single one; (d) to amend the charter, either by special or general legislation, so as to increase or diminish the municipal powers; (e) to repeal the charter, and thereby dissolve the corporation.

Territorial changes. In enlarging the boundaries of a municipality, only adjacent or contiguous territory can be attached. The courts of the country have been inclined to restrict the scope of the legislative power in enlarging corporations so as to observe the unity, territorial as well as legal, of a munic-

ipal corporation. Accordingly, it has been ruled that non-contiguous territory cannot be annexed. In some instances the expression is: The land annexed must be contiguous or adjacent. It has also been held that an unoccupied tract of land cannot be added to the territory of a village merely for the purpose of increasing the tax list and village revenue, but that when such lands are platted and held for sale for use as town lots, or held and sold as town property, they may be annexed to the corporation. They may also be annexed when they are needed for any proper municipal purpose, such as sewer, gas, or water, or to supply residence sites for citizens, or when they furnish a present abode for a large number of persons, or are valuable for prospective town uses.

The legislative assembly may also diminish municipal boundaries by excision of a part of the territory. This, too, may be done without consulting the municipality, or that portion of its citizens thus summarily deprived of municipal privileges, unless forbidden by constitutional limitations. In short, this power of increase and diminution of municipal territory is plenary, inherent, and discretionary in the legislature, and, when duly exercised, cannot be revised by the courts.

14. **Division of territory.**—The legislature may likewise, without the consent of the people of a municipality, divide the same into two separate and distinct municipal corporations. In cases of such division the legislature may apportion the burden of indebtedness between the two, and determine the portion to be borne by each. It may likewise provide

for a division of the property of the old municipality between the two parts thereof. In absence of legislative regulation, each portion will hold in severalty for public purposes the public property which falls within its limits.

15. **Consolidation.**—Likewise it is competent for the legislature, unless forbidden by the constitution, to unite two or more distinct municipalities having contiguous territory into a single municipal corporation, without the consent of those corporations or the people thereof, and also to provide for the disposition of the municipal funds in the several corporate treasuries, or past due at the date of consolidation. Those items of property belonging to the two old corporations so united, unless otherwise expressly provided, become the property of the new corporation, and the corporate indebtedness of the two former corporations becomes the indebtedness of the consolidation.

16. **Legislative power.**—The power of the legislature over a municipal corporation extends to the amendment of its charter in such manner and to such extent as may seem wise to the legislature. An entirely new charter may be enacted for the new corporation, or specific amendments made to the original. Amendments may be made to the general corporation laws, or new general laws may be enacted, which will have the effect of modifying the charter. Mr. Justice Field, touching the dissolution of the municipality of Memphis, said: "There is no contract between the state and the public that the charter of a city shall not at all times be subject to legislative control. There is no such thing as a vested

right held by any individuals in the grant of legislative power to a municipality."[6]

17. **Dissolution.**—The legislature may, too, at its pleasure, repeal the charter of a municipal corporation, and thereby terminate its existence. The loss of an integral part of a municipal corporation would practically destroy it, as if the people should all remove from the territory, or it should be swallowed by an earthquake or volcanic eruption. The corporations of Herculaneum and Pompeii were as effectually destroyed as the cities themselves, and it cannot be doubted that a municipal corporation would be as effectually destroyed by American as by Roman ashes and lava.

Historically, however, and legally, too, the only form of dissolution known to American municipalities is legislative. Whenever and however, and from whatever motive or purpose, the legislature shall repeal the charter of a municipal corporation, its life is ended.

The citizens and creditors of the corporation, having vested rights in certain property, franchises, and powers of the corporation, may protect and assert them through recognized remedies in the courts of law and equity, state or federal. The pursuit of these remedies by the citizens and creditors is simply the administration of the estate of the deceased.

[6] Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197, LEADING ILLUSTRATIVE CASES.

CHAPTER II.

THE CHARTER—CREATOR AND CREATURE.

18. **General and special charters.**—Municipal corporations in the United States, with reference to the mode of their creation, are divisible into two great classes: (a) corporations created by special act of the legislature; (b) corporations organized under general incorporation statutes. Every municipal corporation has, or should have, as a warrant for its existence and authority, some official document issued under law by some duly constituted ministerial agent, showing its constitution and the limits of its authority. This document, which is generally called its charter, when issued under a special act, is usually in the form of a duly certified copy of such special act under the great seal of the state; but, when issued under the authority of general statutes, it may take the form of either a charter, or a court decree, or a certificate showing the fact of incorporation for municipal purposes. This document may contain a description of the territory, and a full outline of the powers, such as appear in special charters, or it may be merely a certificate of the fact of incorporation of the specified municipality, in which case reference must necessarily be had to the general statutes for powers and privileges, and to other official documents showing boundaries and further

details as essential conditions precedent to the granting of the charter.

A municipal charter, whatever be its form, is a written document constituting the persons residing within fixed boundaries, and their successors, a body corporate and politic for and within such boundaries, and prescribing the powers, privileges, and duties of the corporation.

19. **American charters.**—An outline of the general features of the modern charter for an American municipality is the following:

(1) The inhabitants of the town or city by its proper name are constituted a body politic and corporate, with right of perpetual succession, and power to use a common seal, sue and be sued, purchase and hold property, etc.

(2) The territorial boundaries are distinctly defined, and the division of the territory into wards.

(3) The governing body of the corporation is ordained, composed of one or two divisions usually called aldermen or councilmen.

(4) The qualifications of the voters are prescribed, commonly the same as voters at state elections; but sometimes the voters are required to be property-owners residing within the corporate limits, or owners of real estate within the limits residing elsewhere.

(5) The officers to be chosen, and the mode of their election are declared.

(6) An enumeration of the powers of the city council, such as to levy and collect taxes, make local improvements, enact local ordinances, punish violations thereof, borrow money, make streets, hold

courts, and numerous other appropriate municipal powers.

This charter, resembling the constitution of the state, is the paramount law of the municipality. But with it must be considered, also, the state statutes and constitution, and the general jurisprudence of America, and the public policy of the state.

20. **Municipal powers.**—Under a general grant of authority to pass such by-laws as shall be needful to the good order of the city, power has been upheld to "establish all suitable ordinances for administering the government of the city, the preservation of the health of the inhabitants, and the convenient transaction of business within its limits." The general welfare clause has also been held to confer power to prevent the keeping of bawdy-houses; the feeding of cows on distillery slops, and selling their milk within the city; the public exposure for sale, or sale of merchandise on Sunday; the sale of liquor on Sunday; the keeping of saloons, restaurants, and other places of public entertainment open after ten o'clock at night; the carrying on of the laundry business in a certain portion of the city; to forbid all disorderly shouting, dancing, etc., in streets and public places; to regulate the keeping and selling of gunpowder within the corporate limits; to require elevators inside all stores to be inclosed; to prohibit the throwing of heavy or dangerous articles from upper stories of buildings into streets and open spaces near them used as public passways; to establish fire limits, and to prevent the erection therein of wooden buildings; to prohibit cruelty to animals;

to prohibit visiting at gambling houses; and to fix the time and places of holding public markets for the sale of food, and regulating the same.

Powers Denied. But on the contrary, it has been held that the general welfare clause does not authorize a city to aid in constructing a plank road or toll bridge by a private company beyond the corporate limits; nor to require the proprietor of a theater, circus, or other licensed place of exhibition to pay a police officer for attendance upon the place; nor to subject to a fine "any person whose known character is that of a prostitute"; nor to levy taxes upon retailers of ardent spirits; nor to require druggists to furnish verified statements quarterly of the kind and quantity of intoxicating liquors sold, and to whom; nor to exact a license-fee from peddlers in the discretion of the mayor; nor to require cotton merchants to keep a record of their purchases of loose cotton; nor to prohibit street-processions, with musical instruments, banners, torches, singing, and shouting; nor to require a license-tax for a temporary stand for the sale of lemonade, cake, etc.; nor to prescribe a different mode of trial and punishment, in addition to that provided by the state law, for enticing and harboring seamen; nor to regulate and license the sale of liquors, in addition to the state regulation and license; nor to prohibit the retail of liquors by one duly licensed by the state; nor to forbid it during any divine service held within the corporate limits.

21. **Corporate powers, classes of.**—The powers, functions, and duties of a municipal corporation are

ivisible into two great classes: (1) governmental: nat is, those which are conferred and imposed upon municipal corporation, as a local agency of limited nd prescribed jurisdiction, to be exercised by it in dministering the powers of the state, and promoting ne public welfare within it; (2) municipal: those onferred and imposed for the special benefit and dvantage of the urban community incorporated into distinct corporate person or municipality.

Under the head of "governmental powers" are lassified (a) powers pertaining to the administra-on of justice; (b) all police powers; (c) power of minent domain; (d) powers for the promotion of ublic education; (e) powers to maintain a fire de-artment; (f) all other charter powers to be exer-ised by the municipality, as an agency of the state, or the benefit of the public, in or for the exercise of hich the corporation receives no consideration.

All other charter powers and duties, including not nly those which are mandatory, such as the proper are of streets and alleys, but also those powers which re discretionary, such as the erection and mainte-ance of waterworks, gasworks, and electric plants, rom which profit may be derived by the municipal-ty, are municipal.

In the exercise of its governmental powers and unctions the municipality represents the state; and he officers executing these powers are rather officers f the state than of the municipality, and, as such, hey are peculiarly subject to the control of the state; hile those officers who perform strictly municipal unctions are municipal officers to be chosen by the

corporation, and are not so subject to legislative control.

22. **Land and people.**—Every person residing within the municipal boundaries, whether he will or not, is a member of the corporation, subject to its lawful authority, and entitled to the privileges and immunities of membership, as well as liable to the burdens and liabilities thereof. And persons who come within the corporate limits, though they are only passing through the city, are, so long as they remain within its boundaries, subject to all its police regulations, and bound to obey the same.

The municipal authority is coextensive with the municipal boundaries, and generally is limited by them. The exceptions to the rule that the corporate limits are the boundary of corporate authority are few and special. Some acts give jurisdiction of territory outside municipal boundaries from which the city obtains its water supply; and likewise to prevent nuisances in adjacent territory lying beyond the city limits. A city has also been held to possess implied power to make a contract with an adjoining landowner to give an outlet to its sewage beyond the city limits, and to control the necessary sewer system beyond its limits.

23. **Acceptance of charter.**—The acceptance of a municipal charter by the citizens of the municipality is not necessary to its validity, unless required by constitutional provisions. Yet it is competent for the legislature to make the grant of charter powers conditional upon their acceptance by a majority of the inhabitants.

All legislative power not exclusively withheld by the constitution is inherent in the general assembly; and, while this power may not be delegated, it is competent for the legislature to prescribe the condition upon which its special enactment may become law, just as under general statutes of incorporation it prescribes the mode in which municipalities may be created by the local action of the inhabitants.

24. **Judicial notice.**—The courts take judicial notice of the charter of a municipal corporation created by special act. It has been ruled that the charter of a municipality is a private act, and, like other private acts, must be pleaded and proven. But the great weight of judicial opinion, and the general practice thereunder, in the United States, warrant the statement that municipal charters will receive judicial notice, though they are special and not general statutes. It follows, of course, that, the charter being a public statute, all amendments and supplements thereto are likewise public. But this rule does not apply to the charter of a city incorporated under a general statute, nor to the ordinances and by-laws of any municipality. Such statutes, ordinances, and by-laws are not only special but private acts, and must be specially pleaded and proven, unless otherwise provided by statute.

25. **General law.**—The charter of a municipal corporation may be obtained and formulated under a general law declaring the powers, privileges, and immunities of the corporation, and authorizing its organization upon popular initiative by officers of the state exercising ministerial functions conferred

for that purpose in the general statute. Under these statutes a required number of the proposed municipality initiate the movement for incorporation by an enumeration of the voters within the proposed precincts, followed by a special election to determine whether a majority of the people favor incorporation. If the vote is in the affirmative, then an election is held for the officers necessary to organize the corporation and set it in motion.

26. **Powers classified.**—The municipality possesses no other powers than: (a) those expressly enumerated in the charter; (b) such as are necessary for their appropriate use and execution; (c) such as are necessarily inherent in every municipal corporation.[7]

27. **Form of charter.**—A municipal charter requires for its validity no particular form of words, but is valid and effective if the language employed manifests legislative intention thereby to erect a municipality.

Indeed, it may be regarded as already settled law that a municipal corporation may be created by implication, as well as by the use of the customary words in the charter. But the implication must be natural and necessary, and if, besides the absence of the usual words of incorporation and the omission of the essential properties thereof, there is no language from which either may be implied by the use of the recognized rules of interpretation, then the charter is essentially defective, and the municipality is not created thereby.

[7] Winchester v. Redmond, 93 Va. 711, LEADING ILLUSTRATIVE CASES.

28. **Repeal of charter.**—A municipal charter, whether granted by special law or obtained under general laws, may be repealed by legislative act, either general or special, unless forbidden by the constitution. If the subsequent statute plainly manifests the unmistakable intention of the legislature that the provisions of the former statute shall no longer be in operation, then the repeal is effected; otherwise, the former statute generally remains in operation, even though the two statutes may not be harmonious. A special charter may thus be repealed not only by a special act, but also by a general act of legislation declaring that all municipal charters, or all of a certain class, including the one in question, are repealed, or enacting that the corporations are or shall be dissolved. So a charter under a general incorporation act may be repealed by special public law enacted for that particular purpose, as well as by a general statute, or by constitutional provision necessarily repugnant to, and irreconcilable with, the previous law.

How the charter of a municipal corporation organized under general law may be practically repealed is an interesting matter of inquiry, and has been the subject of much judicial consideration. Where the constitution forbids, the legislature may not pass any special statute affecting a municipal corporation, and therefore it may not repeal any charter by a special act. But in the absence of any such constitutional inhibition, the legislature may repeal any municipal charter by any recognized mode of legislation. By a single act it may repeal a single munic-

ipal charter, or the municipal charters of a certain class of corporations, or all charters of all the municipal corporations within the state.

29. **Governmental supervision.**—In addition to creation, alteration, and dissolution of a municipal corporation, the legislature, by virtue of its sovereign powers, may exercise supervisory control over its governmental functions and public affairs and property. A municipal corporation is peculiarly a government of the people, by the people, and for the people residing within the corporate limits.[8] And one of the chief functions of such a corporation is the local exercise of the police power thereof. Not only the citizens of the municipality, but all who come within its boundaries, are subject to its jurisdiction. Its authority extends over these as well as the persons who are permanently within this jurisdiction. The exercise of its functions requires lands, goods, chattels, and money. The corporation must buy and sell. It incurs obligations which must be discharged. This property and these obligations may be strictly municipal, or they may be public in the wider sense. Out of this complex body, with its varied powers, purposes, and properties, and the administration of its affairs, must arise, therefore, many kinds of local rights, powers, and obligations, conflicting and complicated. In property bought and held specially for local purposes, the local community have a special interest, as has also the creditor who furnished money for its purchase.

[8] People v. Hurlbut, 24 Mich. 44, 9 Am. Rep. 103, Leading Illustrative Cases.

30. **Officers.**—In the absence of constitutional inhibition, the legislature has unlimited power of control over those municipal officers who are charged with the performance of governmental functions devolved upon the city, but cannot interfere with those officers who perform functions of a distinctly municipal character. This power is illustrated in many states by the creation of what is known as the "metropolitan police" for the larger cities. This police force is usually appointed and controlled by a board of commissioners, chosen either by the legislature or governor of the state, as an exercise of the sovereign power of legislation and patronage.

31. **Public revenues.**—The legislature has the same power over the public revenues of a municipality as over the immediate funds of the state, and in the exercise of this authority it may appropriate these revenues to any public purpose conducive to the public good. The ordinary revenues of a city are not its property in the sense in which private property is held by an individual. Such revenues belong to the public, and the collection and appropriation thereof by a city is the exercise of a trust function by the municipality for the benefit of the public.

The legislature is the representative of the public in this as well as other matters, and it may change these public revenues from one public channel to another at its discretion. The doctrine is generally recognized that no municipal corporation can have any vested right in the powers conferred upon it for governmental purposes. Therefore revenues

raised by taxation, though levied for specific public purposes, are so far subject to the legislative will that by it they may be applied to other uses of the community.

32. **Municipal funds.**—This power of the legislature to control municipal funds applies only to the strictly public or governmental revenues of the city, and rests obviously upon the sovereign legislative power of the state in all public matters. It does not exist with regard to property in which the municipality has a private interest or creditors have a vested right.

One rule governs public or governmental funds; another and different rule controls in handling quasi-private funds. The public controls the public funds. The municipality disposes of its own funds. The legislature has full power over the revenues of a corporation, the source of which it may prescribe and alter at its pleasure. It may give or it may withhold, for example, the power to grant and tax licenses for various occupations; also the power to levy and collect wharfage or ferriage; or penalties for breach of law or of contract. It may ratify void local assessments; it may compel the satisfaction by the city of non-legal claims against it; it may regulate the use of streets, highways, and other public places; it may transfer the control of the parks, streets, and other public places to a board of commissioners appointed by the state. It may also create a board of police commissioners, and regulate the compensation for them and for the police officers of the municipality, and compel their payment out of the municipal treas-

ury. But quasi-private rights and property are not thus subject to arbitrary disposal.

33. **Franchises.**—Public franchises held by a municipal corporation under legislative grant may be altered or revoked at the legislative will. All municipal franchises are subjects of legislative grant, and, whether granted to third persons or to the corporation itself, may be revoked before the grantee has performed the public service imposed as a condition of the grant. For example, the right to construct waterworks, gasworks, or electric plants, and to supply the city and its citizens with these public utilities necessary for an urban population in modern times, may be granted either to the municipality or to a private corporation organized for that purpose.

34. **Municipal obligations—Vested rights.**—The legislative power of the state over the contracts and obligations of municipalities is limited by the vested rights of third parties, and the prohibitions found in many of the state constitutions. Subject to these limitations, the state has control over the contracts and obligations of a municipality. Parties who have become creditors of a municipal corporation upon faith of the taxing power granted to it to meet its obligations may enforce the execution of this power by appropriate process. The taxing statute is thus held to be a part of the contract whose obligation cannot be impaired; but the mode of taxation may be altered if the change does not materially affect the creditors' security. So, too, certain property may be made exempt from, which was originally subject to, taxation. But where credit has been given

to a municipality upon the faith of a statutory provision that no further bonded indebtedness shall be contracted by the city, an injunction has been granted to restrain an increase of bonded indebtedness, upon the ground that it would impair the obligation of a contract. So, also, creditors may acquire a vested right in a sinking fund provided for their security, so as to authorize them to call upon the courts to prevent any material change in its character, or diversion of it to other uses.

35. **Imposed obligations.**—Upon the elementary principle that duty imposes obligation, the legislature has authority to impose upon the corporation without its consent, and even against its protest, such obligations as will enable it to perform its public functions. A city may be compelled to pay a debt in excess of a legislative limit of indebtedness; to levy and collect taxes and appropriate them to the building and repair of highways, bridges, and canals; also to expend money for the improvement of docks, wharves, and levees; also to collect and appropriate money for the support of public schools of the city, and even to provide for the distribution of money raised by taxation for school purposes after its collection; also to compel the payment by a public corporation of a just debt not enforcible in law or equity; and in a leading case the Supreme Court of New York has carried this doctrine to the extent of sustaining a statute passed levying a tax upon the property of a corporation, and appropriating the same to the payment of a private demand against the town, which had been expressly rejected by the

voters of the town at an election held under legislative authority for that purpose, and intended as a settlement of the right.[9] But it is equally well settled by repeated decisions that it rests with the inhabitants of a municipality to determine conclusively whether a debt shall be incurred for purely municipal purposes; and in the celebrated Detroit Park Case it was ruled that a public park was a matter of municipal concern, and that the levy of a tax for the purchase and improvement of such parks could not be enforced by the legislature without the consent of the municipality.[10] But the people of Philadelphia were unwillingly compelled to pay hundreds of thousands of dollars annually for the erection of the city hall[11] upon a scale of magnificence better suited for the capital of an empire than the municipal buildings of a debt-burdened city, and well described as "surpassing in extent and grandeur the town halls and cathedrals of the Middle Ages."

36. **Property.**—Public property held by a municipality for the benefit of the general public may be controlled and administered by the state as supreme trustee for the public; but property which has been actually acquired by a municipal corporation in the course of administration, and held for the benefit of the municipality, is not subject to the absolute control of the legislature.

In Michigan, Judge Cooley says: "It is immaterial in what way the property was lawfully acquired,

[9] Town of Guilford v. Cornell, 18 Barb. 615 (N. Y.).
[10] People v. Detroit, 28 Mich. 228.
[11] Perkins v. Slack, 86 Pa. 270

whether by labor in the ordinary vocations of life, by gift, or by descent, or by making profitable use of a franchise granted by the state; it is enough that it has become private property, and it is then protected by the law of the land."[12] It is hardly proper, in other states where home rule is not so highly favored, to speak of any municipal property as private property. It is, however, essentially trust property, the municipality being the trustee, and the people of the locality the cestuis que trustent of strictly municipal property. In New York, too, it was decided that certain real estate held by the city in fee simple absolute under ancient grant, upon which at great expense the city had constructed reservoirs, could not by any legislative action or proceeding be converted into a public park without compensation to the city.[13]

37. **Public highways.**—The legislature has general control over all streets, canals, rivers and bridges and other public thoroughfares, and may compel the municipality to make such expenditures thereon for their improvement as it deems best for the public welfare.

In Massachusetts it has been held that the legislature may charge the cost of an authorized public improvement upon the municipal corporation chiefly benefited thereby. In Maryland and some other states, so important is this duty to maintain streets and highways that it may be enforced by mandamus

[12] City of Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140, 5 N. W. 275.

[13] People v. Ingersoll, 56 N. Y. 1, 17 Am. Rep. 178, LEADING ILLUSTRATIVE CASES.

at the suit of a private person without showing special interest or injury. The power of the legislature over streets is so great that it may, so far as the public is concerned, determine to what use they may be put, even to the authorization of a nuisance in them.

CHAPTER III.

MUNICIPAL OFFICERS AND THEIR ACTS.

38. **Corporate meetings.**—The corporate affairs of a municipality must be transacted at a corporate meeting of the members of the governing body, duly convened at the stated or notified time and place, a quorum being present, and a majority thereof expressly favoring the action taken. Meetings are of two kinds: stated or regular, and called or special; the stated meeting being fixed in time and place by charter, ordinance, or usage; the called meeting, one specially convened in emergency.

Of a stated meeting every member has due notice by the statute, rule, or usage under which it is held; but of the called meeting reasonable notice of the time and place is required to be given. If extraordinary business is to be transacted, then notice must also be given of its nature. Actual presence of a member not protesting at a called meeting is equivalent to notice. All members must be present or notified to make a valid special meeting. The notice must be personally served, if practicable. Unnotified members who are actually present may avoid the presumption of notification by protesting against the meeting for want of notice.

A majority of the body constitute a quorum, unless it is otherwise provided by law. A quorum is compe-

tent to transact corporate business, and a majority of such quorum is sufficient to take any lawful action, or make an election. Thus, if the body be composed of nine, then five make a lawful meeting and three of these may pass any ordinance or resolution, or commit the corporation to legal obligation.

39. **Mayor and council.**—The executive head of the municipality is the mayor, who is generally also a member of the governing body, and presides over it ex officio. The mayor's functions are prescribed in the charter, and differ in various municipalities. In some, as the executive head of the corporation he possesses the veto power, in others the appointing power, and yet in others both of these; in some, as the presiding officer he has power to cast only the deciding vote in case of tie; in others, his functions and duties are the same as those of any other member.

A council composed of de facto members, in whole or in part, may lawfully transact corporate business. Corporate council proceedings can only be conducted in corporate meetings, and they cannot be delegated to others to be performed by them.

An adjourned meeting is merely a continuation of the original meeting, and notice is not required for it. At such meeting any business may be transacted which could properly have come before the board at the original meeting, and the mode of proceeding at such meeting is the same as that in the original meeting.

40. **Records.**—Minutes of the proceedings at a meeting of the council duly recorded in the books of the municipality are public records, and as such are

competent evidence either for or against the corporation, as well as third parties, of the corporate acts and proceedings therein recorded. But such proceedings may be proven by other corporate evidence. And any inhabitant, taxpayer, or other person having an interest under the proceedings may inspect the record and have copy thereof on tendering the usual fee.

41. **Ordinances.**—An ordinance is a by-law of a municipality, enacted by the council or governing body as a local law prescribing a general and permanent rule for persons or things within the corporate boundaries. "By-law"[14] is a general term now applicable to the self-adopted rules of all classes of corporations; "ordinance" is used to describe the self-governing rule of a municipality. It is not so comprehensive as "regulation" and is more solemn and formal than "resolution." "Ordinance" is a continuing regulation, while "resolution," though sometimes held to enact a law, is usually declared not to be the equivalent of an ordinance.

42. **Enactment.**—Where the charter, or the general law, prescribes the procedure for the enactment of ordinances, it must be complied with, else the ordinance is void. For example, if the law requires that the ordinance shall be read at three different meetings before final passage, such provision is mandatory and essential to a valid ordinance. An ordinance should be legislative in form; but this is not essential to its validity. It must be duly recorded, and formally approved, where approval is essential to

[14] Literally, law of the by, and so the local laws of Rugby, Scrooby and Derby.

validity. Publication must be made in the manner and to the extent prescribed in the statute.

43. **Essentials of valid ordinance.**—An ordinance may be void not only for want of corporate power to enact it, or for the failure to observe the prescribed procedure essential to its validity, but also because it is contrary to certain well-established doctrines of the law in regard to such regulations, chief of which are that a municipal ordinance, in order to be valid: (a) must not contravene constitution or statute; (b) must not be oppressive; (c) must be impartial, fair, and general; (d) must not prohibit, but may regulate, trade; (e) must not contravene common right; (f) must be consistent with public policy; (g) must not be unreasonable.

Ordinances have been declared invalid which empower purchasers of land at a tax sale to call upon the police to put them into possession; which impose a license upon towboats engaged in interstate commerce; which required a cotton dealer to report to the police the names of all sellers of loose cotton, with the amount purchased by him; which discriminate between resident and non-resident traders; which donated the bodies of dead animals to certain third parties; also an ordinance imposing the cost, upon abutting property-owners, of repaving a street where the old pavement was still in serviceable condition.[15]

44. **Ordinances.**—*Must not be oppressive.* The courts have not hesitated under this wholesome doctrine to invalidate mandatory ordinances which interfere with the ordinary liberty of the citizen, as, for

[15] Chicago v. Brown, 205 Ill. 568, LEADING ILLUSTRATIVE CASES.

example, an ordinance ordering the arrest, imprisonment and punishment of a free negro found out of doors after ten o'clock at night; one punishing any person knowingly associating with persons having the reputation of being thieves and prostitutes; so one committing the right to erect and maintain a steam engine and boiler to the unbridled discretion of the mayor; also one denying the use of water from the city waterworks to anyone who owed, or whose tenant owed, a bill for water supplied in a previous year, or to a different house; so one committing to an arbitrary official discretion to allow or prohibit street parades; also one forbidding a licensed retailer of liquors to sell between the hours of six p. m. and six a. m.; and likewise one forbidding such sale whenever any denomination of Christian people are holding divine services.

Must be impartial, fair, and general. A regulation requiring certain water consumers to put in expensive meters under penalty of cutting off the water supply was held void for unwarranted discrimination; so one requiring a certain individual named to do certain acts in respect to a building, and imposing a penalty for non-compliance, was held void; as also one requiring particular individuals by name to construct local improvements in front of their lots; so also one forbidding the repairing, altering, or rebuilding any frame building within fire limits, the cost of which should exceed three hundred dollars; also one prohibiting dairies within certain designated limits without the consent of the city council.

Must not prohibit, but may regulate, trade. Under

nis rule an ordinance has been declared void which xed one rate of license for selling goods which are ithin or in transit to the city, and another rate for oods which are not within or in transit to the city; o also one requiring municipal licenses from non- esidents driving interurban carriages or omnibuses nto the city. And it has been held in New Jersey nat whenever a by-law seeks to alter a well-settled nd fundamental principle of the common law, or o establish a rule interfering with the rights of indi- iduals or the public, the municipality must show its uthority under plain and specific legislative enact- nent. It has also been held that an ordinance which rohibits any person bringing second-hand clothing nto a city or town, or exposing it for sale therein, vithout proof of its non-infection, is an unwarranted nterference with trade.

Ordinances to the following effect have been de- lared invalid as contravening common right: One mposing a license tax for selling lemonade and cake t a temporary stand on the sidewalk; one requiring license fee of three hundred dollars from an auc- ioneer, two hundred dollars from butchers, and wenty dollars from a peddler; one forbidding hotel unners from going within twenty feet of a railroad rain, though permitted to do so by the railroad com- any; and one forbidding the renting of private roperty to lewd women.

Must be consistent with public policy. Where a tatute prohibited incorporated towns from subject- ng the stray animals of non-residents to corporate rdinances, a by-law visiting a penalty on the non-

resident owner was held void; and also, in the same state, the ordinance of a municipal corporation with charter power to pass all by-laws deemed necessary for health, cleanliness, etc., and with power to abate nuisances, which restrained cattle from running at large, was held void as being in contravention of the general policy of the state to allow animals to run at large. And where the general statutes of the state abolished the system of hay inspection, and in lieu required the sellers of hay to prepare their hay for market in a particular manner under penalty for non-compliance, a city ordinance prohibiting the sale of pressed hay without inspection was declared void as in conflict with public policy.

45. **Ordinance must not be unreasonable.**—This rule belongs to that class of rules whereby the judiciary have reserved to themselves the power of doing justice in hard cases. Under it the following ordinances have been declared to be unreasonable and void: An ordinance exacting a license from peddlers in the discretion of the mayor; one requiring the building of a sidewalk in an uninhabited portion of the city; requiring all peddlers to pay a license fee of two hundred dollars per month; requiring transients to pay two hundred and fifty dollars per month, and so one requiring a license of ten dollars per day for an itinerant merchant; an ordinance forbidding the running of street cars during the winter months without vestibules; also one prohibiting laundries except in brick or stone buildings; one regulating the weight of baker's bread, prohibiting the sale of loaves weighing less than one and one-half pounds;

ne forbidding the covering of packages of fruit ith colored netting; one forbidding to drive faster an an ordinary gait; an ordinance exempting from cense required of milkmen a dealer having not more an two cows, and delivering by hand; also one equiring license of sojourning auctioneers only; one rohibiting any vehicle used to carry passengers or reight for hire from standing in front of any hotel xcept when actually engaged in receiving or dis- harging passengers or freight; also one requiring a treet car company, under penalty of twenty-five dol- ars, to sprinkle its track; also one compelling the onstruction of a cement sidewalk in lieu of a sub- tantial plank walk; imposing a tax of fifty cents a ole on an electric company; an ordinance requiring railway company with only one night train, passing t eight o'clock, to keep an electric light at every treet crossing from dark to dawn; one requiring ailway companies to keep flagmen by day and red anterns by night at ordinary street crossings where here was no unusual danger; one prohibiting the ompany from moving its cars across the street for he purpose of distributing them in its yards between he hours of six a. m. and eleven p. m.; one requiring a theater manager to pay a police officer two dollars per night for attendance at the theater to pre- serve order; prohibiting any person from permitting drunkards or disorderly persons to assemble at his house, tavern, inn, saloon, cellar, shop, office, or other residence or place of business.

46. **What are reasonable and valid ordinances.**— On the contrary, ordinances impeached as unreason-

able have been sustained as valid in the following instances: Forbidding the keeping of a livery stable in a certain locality, or shoddy or carpet cleaning in a particular neighborhood; one requiring itinerant dealers to pay more license fee than regular merchants; a license of peddlers exempting home producers; an ordinance prohibiting a hotel porter from soliciting on the premises of railroad companies; one limiting the speed of trains to five miles an hour and requiring bell ringing within the city limits; one forbidding such amount of drum beating and horn blowing on the streets as to annoy citizens; one requiring bicycle riders to ring a bell on approaching a crosswalk; one establishing a hack stand; one requiring a passenger on a street car to use his transfer within a time limit, and prohibiting him from selling or transferring the same; one requiring stages and other vehicles to keep off certain narrow and crowded streets; one forbidding sellers of perishable fruits from keeping their vehicles longer than twenty minutes at a stand on a public street between certain hours of the day; one forbidding a hackney coach to stand within thirty feet of an entrance to a public building; one requiring vehicles for hire to occupy designated stands. So also an ordinance regulating the handling of trains in a city is valid which forbids trains from standing across a public street longer than two minutes, or from stopping on a public street crossing except in case of emergency; requiring flagmen at dangerous crossings; forbidding strangers from getting on or off moving trains; also ordinances requiring street railway companies to make quarterly

reports of the number of passengers carried; requiring them to pave the streets through which their tracks run; to provide a driver and conductor on each car. A city may likewise regulate markets by ordinance providing that huckster wagons shall not stand in the market place for more than twenty minutes during certain hours; that fresh beef shall not be sold in less than quarters except between dawn and nine o'clock a. m.; that only licensed occupants of stalls shall offer meats for sale at retail.

Liquor selling. And, in regard to liquor selling, ordinances have been held valid which limit the licenses to one for each one thousand of population; so of one which limits the district or precinct in which liquor may be sold; which prohibits druggists from selling except from prescription; which forbids license unless assented to by two-thirds of the freeholders within a radius of three miles, or without the consent of the county officials; so of one which requires closing of saloons at nine, ten, and eleven o'clock at night, respectively, and from half-past ten to five a. m., and from midnight to five a. m.

Sanitary and police. So also ordinances have been sustained which require lot-owners to clean the snow from the sidewalk; that require restaurants to close at ten o'clock at night; that require keepers of hotels, restaurants, and boarding-houses to report the names of lodgers or boarders, and pawnbrokers to report property received, and description of persons delivering the same, and which prohibit them from purchasing the articles pawned; also ordinances requiring garbage to be removed in a closed vehicle labeled

"Garbage"; and one requiring a lot-owner to remove filth from a private way adjoining his land; also one cutting off gas and water from consumers delinquent for ten days; also forbidding the carrying of deadly weapons,[16] or removing house-dirt or offal through the streets.[17]

47. **Procedure.**—A penalty is a necessary part of an ordinance; but power of forfeiture or imprisonment must be expressly conferred on the municipality. The nature and form of complaint, evidence, and trial for violation of municipal ordinances are so varied in the several states by constitutions, statutes, and decisions therein as to be regarded as matters of local rather than of general law, and therefore are not susceptible of general statement and treatment.

48. **Officers.**—A municipal officer is one who holds for a time a permanent municipal position of trust and responsibility, with definite municipal powers, duties, and privileges. A municipal agent is one employed and intrusted by a municipality with discretionary power to represent it in dealings with third persons. A municipal employee is one engaged in the service of the municipality.

The office endures; the officer is temporary. His term is usually fixed by law, and for a certain period. The law also defines the scope of his powers, duties, and privileges, and thus endows him with a portion of the governmental authority.

An agency is a position of like trust, responsibility, and discretion; but it is distinguished from

[16] Judy v. Lashley, 50 W. Va. 628, LEADING ILLUSTRATIVE CASES.

[17] Vandine, Petitioner, 6 Pick. 187 (Mass.), LEADING ILLUSTRATIVE CASES.

n office by the fact that it is not permanent, but mporary, and was created for a special object.

"Employee" is used to describe one occupying a ermanent municipal position and performing a con- nuing service, but not clothed with discretion, and ith no power to represent or bind the municipality.

49. **Officers classified.**—The officers of a munici- ality corresponding to its powers are of two classes: overnmental and municipal. City comptrollers, easurers, and auditor are obviously municipal offi- rs. So, likewise, the firemen and members of the re department have been declared to be municipal ther than public. The mayor has been held to be, Missouri, a municipal officer, and in Michigan, a ate officer; but it is believed that the former accords ith the general current of decisions, as it does with ne reason of the law. He is the official head of the unicipality, its chief executive officer, the president f the corporation, and specially identified with the cal interests centering in the municipality.

50. **Eligibility.**—Qualifications for holding munic- al offices are usually prescribed by the constitution nd general statutes of the state, but are often ex- ressed in the charter of the corporation. When ualifications are fixed by the constitution, the legis- ature cannot impose additional requirements either y charter or general law. Neither can these be xed by municipal ordinance, nor can statutory quali- cations be changed by ordinance. Residence is gen- rally a qualification; but non-residents have been eld eligible to municipal office. A property qualifi- ation may also be prescribed by law.

Choice and duties. The mode of selecting municipal officers is prescribed in the charter or the general law, and varies greatly in different states and in the several municipalities of the same state. The mayor and members of the governing body are elected by the people; but the treasurer, comptroller, marshal, attorney, and members of boards are chosen in some corporations by the people, and in others by the council. All officers, howsoever chosen, occupy a fiduciary relation to the corporation, and must act solely with reference to the welfare of the community.

51. **Officers de facto.**—An officer de facto is one who, under claim of right or color of title, holds an office de jure, and performs the functions thereof with the acquiescence of the public. A mere usurper or intruder is not an officer de facto. He lacks the color of title and the public reputation and acquiescence essential to a de facto officer. Nor can one be a de facto officer unless he is actually holding an office de jure. Where no office legally exists, the pretended officer is merely an intruder, to whose acts no validity can be attached.

52. **Salary.**—The salary prescribed by law for the official services of a municipal officer is considered the full compensation for all such services rendered by him during his term of office, even though his duties be increased by emergency or by law during the term. The compensation of public officers is under the control of the legislature, by which it may be increased or diminished. Likewise the duties of the office may be made more or less onerous by legislation, or may be increased by emergency arising

uring the term. The officer accepts the office in view f all these possible conditions, and impliedly undertakes to render whatever service may be required, either by law or by emergency, during his official erm, for such compensation as the legislature has rovided or may provide during the term. The incumbent holds over whenever there is a failure to lect his successor, unless such failure is due to his wn official negligence, in which case he is forbidden profit by his own wrong.

53. **Title to office.**—The title to an office cannot e tried or determined in a collateral proceeding, but nly by direct contest. This rule applies only to officers de facto, and will not prevent a party from showng that an alleged or pretended official action was aken by a mere usurper or intruder, for in such case he act is void.

Resignation. At common law, both tender and cceptance were essential to effect the resignation of unicipal officers; but this rule, though recognized till in some localities, is not generally regarded as the aw in America. The doctrine is still recognized in Virginia, North Carolina, Tennessee, Kansas, and perhaps some other states; but the contrary has been xpressly ruled in Iowa, Ohio, Nebraska, California, nd other states, and is more consonant with American habits of thought. However, it has been held y the federal courts and the courts of Texas and llinois that, when the law provides that an incument shall hold office until his successor is elected and ualified, he is not relieved from the duties of his ffice even by the acceptance of his resignation, but

ne must await the qualification of his successor to the office.

54. **Judicial control.**—Municipal officers are subject to judicial control by mandamus, injunction, or amotion to compel performance of judicial duties, observance of the law, and removal of unworthy officers. The jurisdiction of courts in supervising official action is generally limited to ministerial duties. But where power is given to a board of supervisors to fix water rates, the rate fixed must be reasonable and just, so as not to amount to a practical confiscation of the property of the water company; otherwise the courts will interfere. So, also, if any officer refuses to perform a mandatory duty, its performance will be enforced by mandamus, for contempt of which the officer may be punished. Nor can he escape this penalty by resignation after service of the process. So, also, officers may be enjoined from illegal acts threatened under color of their official position.

55. **Removal.**—Generally, the power of removal is an incident of the power of appointment; and, where an officer holds during the will and pleasure of the appointing power, that power is also the removing power, and is sole judge of the propriety of removal. The legislature may authorize the removal of appointive officers at the will of the appointing power, but an elective officer can be removed from office only by due process of law. The power of removal includes the power of suspension pending trial. This power may be conferred either upon the mayor or the governor of the state; but in case of conviction of crime which disqualifies from holding

ffice, the court may pronounce the sentence of dis-
ualification and removal.

56. **Liability on contracts.**—Without special per-
onal undertaking, officers are not personally liable
pon contracts made by them for and on behalf of
ne corporation. But it has been held that an over-
eer of the poor makes himself personally liable by
romising that he will be responsible for the pay-
ent of the charges. In fine, the rule is well settled
nat wherever the parties understand that the con-
act is made by the officer on behalf of the corpora-
on, and it is within the scope of his authority, the
orporation alone is liable, and the officer becomes
ersonally liable only upon manifest intention to that
ffect.

57. **Liability for torts.**—If the duty imposed upon
n officer is a duty to the public, the failure to per-
orm it or an inadequate or erroneous performance
a public injury, and must be redressed, if at all,
n some form of public prosecution. But if, on the
ontrary, the duty is a duty to an individual, then
ne neglect to perform it properly is an individual
rong, and may support an individual action for
amages. It is a general rule that judicial officers
cting within their jurisdiction cannot be held per-
onally liable for the improper or erroneous per-
ormance of their duties. But it is commonly held
nat this exemption from liability in the performance
f discretionary public functions does not exist when
ne officer has been actuated by corrupt or malicious
notives, or has practiced fraud upon the person
uffering injury. On the contrary, the general rule

is that in the performance of merely ministerial duties an officer is liable to third persons for injury suffered by his nonfeasance or misfeasance.

For example, a board of street commissioners, in determining upon the work to be done, on adopting plans and specifications therefor act as judicial officers, and no private action will lie against them for damage done in exercising these functions. But if they undertake to execute these plans and specifications either personally or with the aid of employees, they are liable to third persons for injury suffered from such acts, which are done in a ministerial capacity. It has accordingly been held that a mayor, marshal, and board of health were liable for negligence in removing from the city a smallpox patient and carelessly exposing him to inclement weather so as to cause his death. Also, a public meat inspector is liable for failing to discharge his duty; and street officers for injury done to an adjoining property by changing the grade of the street.

CHAPTER IV.

CONTRACTS AND IMPROVEMENTS.

58. **Municipal contracts.**—Municipal contracts possess the same essential elements, and are executed, enforced, rescinded, and reformed under the same general doctrines as those governing contracts between individuals. Within the scope of its charter powers and in the manner permitted by law, a municipal corporation may enter into contract relations with other persons, having the same general effect and obligation as those of a private corporation or a natural person, and for breach of such contract it will incur similar liability. The courts will enforce such contracts and redress the breach thereof, either for or against the municipal corporation, in the same manner and to the same extent as other contracts between other classes of persons. Such contracts are usually written and signed on behalf of the municipality by the duly constituted authority; but when properly authorized, a valid municipal contract may be made by parol; and there are many cases giving redress against municipal corporations for breach of implied contracts of the municipality.

59. **Ultra vires.**—The capacity of the municipal corporation to make a binding contract is dependent upon power, express or implied, conferred upon it by its charter; and contracts made by a municipality repugnant to or outside of the scope of its charter are

ultra vires and void.[18] Two propositions are settled: One is that a contract by which a corporation disables itself from performing the functions and duties undertaken and imposed by its charter is, unless the state which has created it consents, ultra vires; the other is that the powers of a corporation are such, and such only, as its charter confers, and an act beyond the measure of these powers, as either expressly stated or fairly implied, is ultra vires.

Illustrations. Therefore it has been declared that contracts by which a municipality gave away or exchanged city streets for other property, offered a reward for the apprehension of a person, borrowed money to pay the expenses of an election contest over the removal of a county seat, or to make loans and donations to colleges, are ultra vires, and not enforcible at law. In fact, there is at present general concurrence in the doctrine that the law will not recognize or enforce a municipal contract which it does not authorize. Parties, therefore, seeking recompense for money loaned, material furnished, or labor done for a municipal corporation under an ultra vires contract do not sue for breach of the contract or seek specific performance thereof, but seek recompense either upon the theory of an implied contract and assumpsit, or under some doctrine of equity.[19]

60. **Estoppel.**—Municipal contracts which are within the scope of corporate powers, but which are

[18] Quincy v. Bull, 106 Ill. 337, Leading Illustrative Cases.

[19] London, etc., Land Co. v. Jellico, 103 Tenn. 320, Leading Illustrative Cases.

fective because of irregularity in the method of eir execution, or unlawful because of a secret rpose of the corporation, are not void, but are bjects of ratification and estoppel. And so, if e corporation under a contract of this kind has tained value from the other party, it cannot avoid rescind the contract except upon the condition of mplete restitution or recompense; and if the municiality recognizes such contract, with full knowledge the facts, it may thus waive objection and ratify e same and become bound thereby; as, where offirs or a board having no authority therefor make a ntract for a city within the scope of its charter owers, the common council or other board empowred to make such contract may subsequently adopt ratify the same, just as a natural person may tify the unauthorized contract of his agent.

But the doctrine of ultra vires does not absolve unicipal corporations from the principle of comon honesty. And so "where an act in its external spects is within the general powers of a corpoation, and is only unauthorized because it is done ith a secret unauthorized intent, the defense of ulra vires will not prevail against a stranger who in ood faith dealt with it without notice of such inent."[20] Also where the other contracting party has good faith performed his part of the contract, the unicipality will be held estopped from pleading e shortcomings or faults of its own officers or agents all cases where the contract is not repugnant to or eyond the scope of the corporate power. But if the

[20] 2 Dill. Mun. Corp., § 936.

contract be ultra vires in the true sense, then neither estoppel or ratification will prevent the municipality from pleading ultra vires, and thereby defeating an action brought upon the contract.

61. **Partial validity.**—A contract is not of necessity entirely invalid because a portion of it is ultra vires. In such case, if the portions of the contract which are within the charter powers are separable from the ultra vires portion, the latter only is void. In a leading case the city had made a contract for paving its streets, to do which it was fully authorized, and promised to give its negotiable bonds in payment therefor; but for this it had no authority. The court ruled that, though specific performance might not be decreed in behalf of the contractors, yet the action for damages was maintainable. "It matters not," said the court, "that the promise was to pay in a manner not authorized by law. If payment cannot be made in bonds, because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment may not be made at all; such is not the law. The contract between the parties is in force so far as it is lawful."[21]

62. **Implied promise.**—A municipality may be liable in assumpsit upon an implied contract to pay value for what it has received, where it has made no express promise therefor, or has made an invalid promise which will not sustain an action. The doctrine of implied municipal liability applies to cases "where money or other property of a party is received under such circumstances that the general law, inde-

[21] Hitchcock v. Galveston, 96 U. S. 341.

endent of express contract, imposes the obligation pon the city to do justice with respect to the same."[22] n general, whenever a municipal corporation reeives money or property, or accepts the benefit of abor or services rendered to it, it is bound in law to nake recompense therefor.[23]

To maintain assumpsit against a municipality, owever, the money must have gone into its treasry, or been appropriated by it; and, when it is roperty other than money, it must have been used y the municipality or been under its control. But vith reference to services rendered, the case is different. Their acceptance must be evidenced by ordiance, or express corporate action to that effect. If ot originally authorized, no liability can attach upon ny ground of implied contract; the acceptance, upon which alone the obligation to pay could arise would e wanting.[24]

Municipal contracts, whether made under express, mplied, or inherent power to contract, must necesarily be confined to such subjects only as are usually roper and essential for performance of the corpoate functions of the municipality. A municipality, herefore, though it may contract not only with regard o its strictly public functions, but also with regard o such municipal matters as lights, water, and power or the use of itself and its inhabitants, has no authorty to embrace within its contracts such subjectnatter as manufacturing, extraterritorial railway

[22] Argenti v. San Francisco, 16 Cal. 255.
[23] City of Louisiana v. Wood, 102 U. S. 294.
[24] Argenti v. San Francisco, 16 Cal. 255.

construction and operation, or merchandising, nor may it become surety, nor issue a circulating medium, unless such powers have been specially conferred upon it.

63. **Agents.**—Municipal contracts are necessarily made for the corporation by its duly constituted and authorized agencies, which may be either boards or individuals. The common council is the proper general agent of the municipality to express the agreement either by ordinance or resolution upon the municipal record. The formal execution of the memorandum or indenture of contracts is usually committed to the mayor and recorder or other appropriate executive officer. Moreover, persons contracting with the municipality are bound to take notice of the limits of the agent's authority; and a contract made by a public agent within the apparent scope of his powers does not bind his principal in the absence of actual authority. But if the contract is made by the common council as general agent of the municipality, and within the scope of the corporate powers, express or implied, the authority as agent may be presumed.

Ratification is governed by the same rule as the making of contracts. The power to make such ratification belongs generally to the common council; but it may be made by the particular municipal agency which has the power to make the original contract.

64. **Mode of contracting.**—Wherever the mode of negotiating and executing a municipal contract is plainly and specially prescribed and limited, such mode is exclusive and must be substantially pur-

sued; else the municipality will not be bound by the contract.

The act of incorporation becomes an enabling act. It gives municipalities all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated. Modern decisions have established the law to be that contracts of municipal corporations need not be under seal unless the charter or other legislative enactment so requires; and so it has been held that a municipality may be bound to a contract by ordinance or by a resolution of the common council, or even by parol agreement made through a duly authorized agency.

The mode of letting a municipal contract is usually prescribed by the legislature, and, as we have seen, must be pursued. The statutes and charters, though varied in phraseology, generally contain requirements that the letting shall be upon previous advertisement, and sealed bids based on plans and specifications, and to the lowest responsible bidder.

The following general rules prevail as to letting of municipal contracts: (1) That publication must be made substantially as prescribed, though it has been held that in case of emergency, where delay would work irreparable injury to the municipality, a bona fide contract, free from fraud and favoritism, and at a reasonable price, was valid without preliminary advertisement. (2) That plans and specifications for the contract may be either published in the advertisement or referred to as on file in a particular office,

or may be furnished on application. (3) That bids must remain sealed until the day specified for opening them, to the end that the municipality may have the benefit of fair competition among the bidders; that all bids must be on file within the time limited by the advertisement, and must be publicly opened at the time and place, and by the officer, prescribed by the statute, or in charge of the biddings. (4) That, where the advertisement promises a contract to the lowest bidder, the authority in control of the biddings may reject all bids unless otherwise peremptorily directed by the charter, and no right of action will lie against the city for anticipated profits of the contract.

65. **Illegal contracts.**—Municipal contracts, like the contracts of private corporations and individuals, are also illegal and void whenever they are contrary to law, to public policy, or to good morals. It is a fundamental rule that aldermen and officers of a municipality must not make contracts with it. This is a universal rule, unyielding in its application, and founded on the purest public policy. It prohibits municipal contracts with private corporations in which members of the council may be interested. Such contracts are said to be fraudulent in law, and hence illegal and void.

A promise to pay a public service corporation or its agents a premium for doing their duty is illegal and void. A contract will not be sustained which tends to restrain or control the unbiased judgment of public officers. This applies to a promise by a city to surrender its right to lay out a street; also to a contract binding the city authorities not to exercise their

egislative powers in a certain manner in the future; nd a contract to employ none but union labor, or to uy only such articles as have a union label.

A contract in violation of a statute or constitution s also illegal and void. And so a municipal contract btained by means of a combination of contractors o prevent competition is illegal and void, not only as eing contrary to statute, but also against public olicy; and a municipal contract granting exclusive ights and franchises made by a city otherwise than n the exercise of its police powers, is likewise illegal nd void.

66. **Annulling contracts.**—A municipality has no ower to annul its contracts arbitrarily, but may re- ounce, terminate, or rescind them only on the same erms and under the same conditions as other con- racting parties. Municipal contracts are held to be ade in the exercise of municipal rather than gov- rnmental powers. The contracting parties are equal efore the law, both as regards the making and per- ormance of the contract, and each has the same ight and remedy as the other. The city, therefore, ossesses no power of annulling its contracts in vir- ue of its public character. The analogy of the law f private corporations is generally recognized as ontrolling in such matters.

A municipal contract cannot be impaired by state egislation. Legislative control over municipal pow- rs, and even municipal existence, as we have seen, s unlimited. It can create, direct, control, modify, nd destroy the municipality; but it can pass no law mpairing the obligations of a municipal contract.

However great the control of the legislature over the corporation while it is in existence, this must be exercised in subordination to the principles which secure the inviolability of contracts.

67. **Money contracts.**—The inherent or implied power of a municipal corporation to borrow money and execute negotiable paper or municipal bonds therefor is an unsettled point of municipal law in America, a majority of the cases seeming to recognize the existence of that municipal power, while the weight of the reasoning denies it except where expressly conferred.

The following views of Judge Dillon are sound doctrine:[25]

(1) Municipal expenses are based upon municipal revenues, and the power to borrow money as a means of making future improvements or meeting current expenses cannot be implied from the mere authority to make such improvements, or from the usual grants of municipal power.

(2) The nature of the usual functions of a municipality is so widely different from that of a private corporation as not to warrant the use of analogy to determine the inherent powers of the municipality as to borrowing money and issuing commercial paper.

(3) The power to issue negotiable paper, unimpeachable in the hands of the holder, is not an inherent or implied power of a municipal corporation.

(4) Power to issue negotiable paper may be properly inferred from the express power to borrow money granted to a municipality.

[25] 1 Dill. Mun. Corp., § 125.

(5) Municipal paper, negotiable in form, if issued by a public corporation required to audit all claims and issue to the creditor warrants or orders therefor, is subject to all legal and equitable defenses in the hands of a transferee, as of the original holder.

68. **Municipal improvements.**—Municipal improvements include all those additions to or changes in the municipal property, made by the use of money and labor or skill, for the purpose and with the effect of enhancing taxable values or ameliorating conditions of life in the municipality. They are necessarily public, but may be either local, as conferring special benefits upon a certain street, block, or section; or general, as bettering the entire municipality. The latter are generally paid for out of the municipal treasury, the former by local taxation.

Streets must be laid out, graded, curbed, guttered, paved, and lighted; sidewalks must be laid; municipal buildings must be erected; water must be furnished, sewers constructed, and in these times electric plants are coming into municipal use to furnish not only light but power for municipal purposes. Parks, also, are urban necessities, and boulevards contribute greatly not only to the beauty but the health of a city. Nor are public schoolhouses, halls, hospitals, and auditoriums to be omitted. The construction and care of all these things properly appertain to a modern municipality, and they are embraced within the comprehensive term "improvements," whether they are general in their nature, for the common use of all the citizens, or, by reason of being local, afford special benefits and advantages

to citizens owning property or living in a particular locality.

69. **Power to make or aid improvements.**—The power to make general improvements is inherent in every municipality; but the power to make local improvements at the expense of the locality must be conferred expressly by the charter or by statute, or plainly implied. The general amelioration of urban conditions is the paramount object of municipal incorporation. So no express authority is necessary to be given to a city to require lot-owners to lay sidewalks in front of their property; and if a lot-owner fails to make such improvement, when notified to do so, the city may do the work, and collect the cost thereof from the property-owner.[26] And a city not only may, but must, take proper care of its streets and alleys; and this it may do, at an expense within the limit of its annual revenues appropriated to that purpose, without express charter authority. It may also, without express grant of power therefor, contract with a gas or electric company to provide light for the city; but if an extensive scheme of grading and paving at great expense is to be entered upon, requiring more than the annual revenues, and thereby incurring large municipal indebtedness, or if, at large expense and by municipal loan, the city wishes to construct its own gas or electric plant, it must have express legislative authority therefor.

70. **Preparations for improvements.**—It is essential to the validity of any scheme of improvement that all the substantial requirements of the charter

[26] City of Pittsburgh v. Daly, 5 Pa. Super. Ct. 528.

statute authorizing the same shall be strictly observed and complied with. Municipal repairs or light betterments made within the limits of ordinary revenues are not generally considered to be included in the meaning of the term "improvements." This word is commonly employed to describe such radical or thorough changes in physical conditions as involve extraordinary expenditure or unusual taxation. It is usually conditioned upon the assent of those to be burdened by the proposed improvement. If it is general, the assent is required to be manifested by a popular election showing the favor of a bare majority or two-thirds or three-fourths of the entire vote cast, or of all entitled to vote in the election. If it is a local improvement, the condition precedent may be either a petition for the improvement, generally required to be signed by a majority of all freeholders to be affected thereby; or a judicial declaration by some court *pro hac vice* (for this purpose). These provisions are mandatory, and compliance with them is absolutely essential to the exercise of the power.

The rule of strict construction is also applied to statutes giving this power of special or extraordinary taxation. A guardian of children cannot be counted to make a majority of property-holders signing a petition; nor one of two joint tenants; nor a life tenant. The names of property-holders upon an original petition to the council, which has been laid upon the table, cannot be added to those subscribed to a subsequent petition for the same improvement, in order to make a majority.

Where the council is vested with power to order and make the improvement, either upon petition or notice, and these formal requirements have been complied with, the power of the council is discretionary and quasi-judicial, and its decision is conclusive in the absence of mistake or fraud; and the courts will not interfere to prevent it because of alleged prodigality or inutility. And where the council is authorized, either expressly or by fair implication, to determine whether a majority of property-owners have requested the improvement, their action in ordering the improvement thereon is a conclusive determination of that question.

71. **Conditions of contract for improvements.**—A municipal contract for public improvements is subject to the following limitations and conditions: (1) The subject-matter of the contract must have been included within the ordinance or resolution ordering the improvement; (2) the contract must not surrender or abdicate any public function or duty; (3) it must be let and made in the prescribed method. At every step in the transaction there is a challenge of authority which the contractor must heed at his peril: (a) Has the legislature under the constitution power to grant authority to the municipality? (b) Has the legislature duly conferred such power upon the municipality? (c) Has the governing board of the municipality, in pursuance of such authority, ordained that the improvement shall be made? (d) Is the proposed contract within the scope of the ordinance? (e) Is the person assuming to represent the city in making the contract an authorized agent

nereof? If an affirmative answer can be given to all nese questions, the contractor may feel secure in roceeding under his municipal contract.

To determine whether the contract is within the cope of the ordinance, particular attention should e directed to ascertaining whether the contract is 1) within the topographical limits prescribed in ne ordinance; (2) within the monetary limits fixed nerein; (3) of the nature of the improvement or- ained by the council. But under a statute giving corporation authority to construct sewers within ne municipality and beyond it, the town may con- ruct sewers within its territorial limits, and in that f adjoining municipalities to secure an outlet.[27]

No public corporation may in any way alienate or urrender the trust powers conferred upon it for the ublic welfare. Of this nature are police powers, minent domain, control of streets, and the like. A ontract, therefore, with a gas or water company, per- nitting it to use the streets of a city for the purpose f laying down its mains, cannot obstruct a city in ne exercise of any of these public powers; and the ompany cannot enjoin a contractor from grading elow the level of the pipes, and thus requiring them o be relaid below the new level of the street. Nor ill a contract right of a street railway to use the ity streets prevent work under a contract to regrade he entire street, and thereby disturb the bed and rack of the railway, even though the company had tself agreed to make the improvement.

A contract for a public improvement is one for per-

[27] Butler v. Montclair, 67 N. J. Law 426.

sonal services and skill, and not assignable without the consent of the municipality, and therefore the assignee can maintain no action against the municipality for services rendered by him. A contract let under bidding is made and executed only when a bid has been accepted by the proper agency of the municipality in the manner required by statute. But the acceptance and use of the thing contracted for is a completion of the contract, and estops the corporation from objecting to merely formal matters; also, where the contract provides that matters of uncertainty or dispute arising under a contract in making the improvement shall be submitted to arbitration, no action can be maintained by either party without first offering to make such submission.

72. **No damages for improvements.**—No action lies at common law against a municipal corporation for damages resulting to the property of an individual from the prosecution, with reasonable care and skill, of duly authorized works of municipal improvement.

In the leading case of O'Connor v. City of Pittsburgh,[28] in which, by a reduction of seventeen feet in the street grade, a church which had been erected according to directions of the city regulator was rendered worthless and required to be torn down, the court said:

"We had this case reargued in order to discover, if possible, some way to relieve the plaintiff consistently with law, but grieve to say we can find none. The law is settled not only in Penn-

[28] 18 Pa. 187.

sylvania, but by every decision in the sister states, except one. * * * The loss to the congregation is a total one, while the gain to holders of property in the neighborhood is immense. The legislature that incorporated the city never dreamed that it was laying the foundation of such injustice; but, as the charter stands, it is unavoidable." The authority which was given the city by its charter empowered it "to improve, repair, and keep in order the streets."

It was ruled in that case that, since the work of improvement did not trespass upon the land of the plaintiff, no property of the plaintiff was taken within the meaning of the constitutional provision requiring just compensation in case of exercise of the power of eminent domain, and therefore plaintiff could not evoke the protection of the Constitution. Since the decision in that case many states have incorporated into their constitutions a provision that private property shall not be taken or damaged for public use without just compensation therefor; and most of the other states have obtained the same result by legislative enactment.[29]

The remedy for obtaining compensation is various in the several states. In some of them the property-holder must appear before the city council and there present his claim for damages, which damages are thereupon estimated by some tribunal provided by statute. In other cases a proceeding must be brought in court by the corporation exercising eminent do-

[29] The state of Ohio has always maintained municipal liability for such incidental injuries; Goodloe & Smith v. Cincinnati, 4 Ohio 500.

main against the property-holder, wherein the property is condemned for the public use, and the damages therefor are duly ascertained; or, if the municipality shall omit to take this proceeding before entering upon the work of improvement, the property-holder may bring it for the purpose of obtaining compensation, with practically the same result as if brought by the municipality. It has often been held that payment of damages must precede the taking of private property for public use; but unless this is provided by statute it has generally been held sufficient that adequate provision is made for ascertaining and securing the compensation.[30] The property-holder is entitled to demand compensation as soon as the appropriation has been definitely decided upon, without waiting for the actual taking.

73. **Special assessments.**—Special assessments for municipal improvements are authorized and made upon the idea that property enhanced in value by such improvements should bear the expense thereof, not as a burden, but as compensation for benefits specially conferred thereby. The authority of the legislature to provide for these local assessments has been established by repeated judicial decision declaring not only their constitutionality, but also their reasonableness. For example, the Supreme Court of Missouri has happily said: "While the few ought not to be taxed for the benefit of the whole, the whole ought not to be taxed for the few. * * * General taxation for a purely local purpose is unjust. It burdens those who are not benefited,

[30] Sage v. Brooklyn, 89 N. Y. 189.

and benefits those who are exempt from the burden."[31]

Whether a given improvement is expedient and necessary, and whether it is general or local, are legislative questions; and when the municipality is vested with power to determine them the municipal decision is conclusive, and not subject to review by the courts. This general doctrine is modified by decisions in some states that there may be judicial inquiry on charge of fraud, mistake, oppression, or corruption, and, if sustained, the court may vacate the municipal ordinance or enjoin the work of improvement. It has also been held that similar remedies may be employed in cases where local assessment has been made for what is obviously a work of general municipal improvement; and it is established law that such remedies may be resorted to when the special assessment is not authorized by statute, or is made without compliance with the statutory conditions precedent. Where discretion is to be exercised by any tribunal in determining whether a special assessment shall be levied, or what portion shall be imposed upon particular property, each owner is entitled, under constitutional guaranty of due process of law, to such notice as will enable him to challenge the expediency of the improvement or the justice of the levy.

Local assessment is obviously an exercise of the taxing power; and yet such assessments have generally been held not to come within the meaning of the word "taxation" as used in clauses of revenue stat-

[31] Lockwood v. St. Louis, 24 Mo. 20.

utes exempting certain property from taxation. For example, "all public taxes" has been held not to embrace local assessments; so also of the phrases "rates and assessments"; "taxation of every kind"; "taxation of every description"; "all taxes, either state, parish, or city"; "all and every county, road, city, and school tax"; "taxes of every kind"; "charges and impositions"; "any tax or public imposition whatever"; "taxes, charges and impositions." In short, exemption from general taxation does not exempt from local assessment.

74. **Collection of same.**—Special assessments, being charges upon particular property, may be collected by enforcing the lien on the property in the method prescribed by the statute. In some states they have been held to afford ground for personal judgment against the property-owner; but the weight of authority, as well as the reason of the matter, opposes such remedy for the enforcement of a special assessment. No valid lien exists unless the assessment has been made in substantial compliance with the provisions of the enabling act. When these have been complied with, the lien becomes fixed in favor of the city, and is not impaired by official misconduct or defective performance in the work of improvement.

The power of the legislature to declare a local assessment to be a personal charge against the owner as well as a lien upon his property has been strenuously contested in many states, while in others it has been allowed to pass unchallenged. In a recent Alaska case it was held that abutting property-own-

's who had petitioned the city for a specific street
nprovement, and had seen the improvement made
accordance with their petition in front of their
roperty, were liable to the municipality for the cost
the same in an action of assumpsit upon an implied
ontract for materials furnished and work and labor
one.[32]

[32] Town of Nome v. Lang, 1 Alaska 593.

CHAPTER V.

POLICE POWERS AND PUBLIC HIGHWAYS.

75. **Police power inherent.**—The police power, inherent in the state as a paramount and inalienable attribute of sovereignty, is essential to a municipality as a public corporation.

Says Blackstone: "The due regulation and domestic rule of the kingdom whereby the individuals of the state, like the members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations,"[33] may be traced to the ancient maxim, "*salus populi est suprema lex* (the safety of the people is the supreme law)." It is the expression of that instinct of self-preservation inherent in every animate creature, and attributed as essential to all nations, states, and corporations. This extraordinary and dangerous power is institutional and inherent in government; and, as wisely remarked by Chief Justice Shaw, "it is much easier to perceive and realize the existence and source of this power than to mark its boundaries or prescribe limits to its exercise."[34] Its summary exercise is always perilous to private right, and often cruelly unjust; as when in emergency, ap-

[33] 4 Bl. Comm. 162.

[34] Commonwealth v. Alger, 7 Cush. 53 (Mass.).

arent or real, the property of one is sacrificed for ne protection of others, or one is deprived of his ersonal liberty for the supposed safety of the many.

76. **Municipal attribute.**—The police power may e delegated by the state to a municipal corporation s a public function to be exercised within proper mits for all appropriate municipal purposes. The xtent of its exercise is always within the legislative ontrol. The police power delegated may be total or artial, or it may be entirely withheld by the legisature from the municipality. It has been decided, owever, in some cases that a certain measure of olice power is one of the inherent or essential powrs of a municipality, for which no legislative grant s necessary. It has been held that a city council annot bind itself nor its successors by contract to course of conduct or of municipal inaction derogaory to the police power delegated by the state to he municipality.[35]

77. **Limitation of power.**—Those powers conferred upon a municipal corporation, which, in their exercise, conduce to protect the public safety and ealth and promote the comfort and convenience of he citizens and the general welfare of the municpality, manifest the legislative intention in regard o the delegation of the police power to the municpality. The corporation boundaries usually mark he territorial limit for the exercise of the police ower by the municipality; but in many instances, or the preservation of the public health especially, he municipality is granted police power beyond its

[35] Davenport & Morris v. Richmond City, 81 Va. 636.

boundaries, as, for example, to acquire outside territory for sewerage purposes, and to exercise police power over the same; also to establish quarantine beyond the municipal boundaries and thus protect the citizens from epidemic of any contagious or infectious disease; also to locate and regulate houses of detention and hospitals for infectious and contagious diseases beyond the city limits.

The city may pass reasonable ordinances for the protection of the lives, limbs, health, comfort, and quiet of its citizens; and it has been held that such measure of police power as this is inherent in a municipal corporation, as being essential to the performance of its municipal functions as a public agency of the commonwealth.[36]

78. **Summary power.**—The police power delegated to the municipality may be exercised either in the ordinary or in a summary manner. The municipality may lawfully employ through its police officers just so much force as is necessary to disperse a mob or quell a riot, even to the extent of maiming or killing persons engaged in the mob or riot, and in case of great conflagration in a city, which cannot otherwise be stopped, the municipality, through its proper authorities, may lawfully, and with impunity, tear down or blow up buildings owned by private citizens in order to arrest the progress of the flames.

When license is required in the exercise of a police power, then only such charge therefor may be made

[36] The police power of a city extends to the regulation of water rates; City of Knoxville v. Knoxville Water Co., 107 Tenn. 647, 61 L. R. A. 888. A city may have a building demolished as unsafe; O'Rourke v. New Orleans, 106 La. 313.

fairly represents the expense incident to the exercise of the power.[37] Whether the license is for police or revenue, if not shown in the ordinance requiring it, will appear from the construction of the municipal charter.

The legislature may confer police power upon a municipality over subjects within the provisions of existing state laws. Jurisdiction to enforce state laws is often conferred upon the municipal courts; but none of these things prevents the state from conferring police power upon municipalities over the same subject-matter.

79. **Peace and order.**—The preservation of the public peace and order is the primary police function of a municipality. Whatever contention may have arisen over municipal police power, the authority to preserve the peace and order of the municipality, to prevent the exercise of unlawful violence, and to compel citizens and sojourners to abstain from riot, rout, and unlawful assembly, has never been seriously questioned. It is regarded as an inherent municipal power essential to municipal life; and so, whenever the authority has been mooted, it has been uniformly sustained, in some cases even to the extent of the doubtful power of double punishment. Such regulations are indispensable to municipalities in those states which, as a measure of public policy, declare municipal corporations responsible for the public peace and preservation of private property, and make them absolutely liable for damages done by a mob within the corporate boundaries.

[37] Ash v. People, 11 Mich. 347, 83 Am. Dec. 740.

80. **Sanitation.**—The preservation of the health of the population is uniformly recognized as a most important municipal function, and the power to adopt and enforce sanitary regulations appropriate to this end is inherent in a municipality. These powers are favored in American courts, and it has been accordingly held that, since a supply of wholesome water is necessary to the comfort and well-being of a city, a municipal contract for the boring of an artesian well is an exercise of the police power. And so, likewise, the city may make such regulations as will insure pure milk or prevent the spread of a deadly disease in a fruit-producing tree. So, also, it may regulate the cultivation of crops, such as rice, within the corporate limits, the cleaning and care of sinks and cesspools, burial of the dead, and the location and operation of slaughter houses. It is competent also for a city to establish quarantine regulations, pesthouses, and places of detention, and to exclude, remove, or detain persons affected with, or who have been exposed to, contagious or infectious diseases. It may regulate also the removal of dead animals and garbage, and compel citizens to prepare the same for removal at minimum expense; and generally may suppress nuisance to the public health.[38]

The power to regulate does not give power to prohibit; and, therefore, a city may not absolutely forbid the sale of meat or second-hand clothing, or other lawful business not in itself necessarily a nuisance. Ordinarily, the municipality must resort to the usual

[38] Ferguson v. Selma, 43 Ala. 398; Smith v. Collier, 118 Ga. 306; Kennedy v. Phelps, 10 La. Ann. 227.

rocess of law to abate a health nuisance; but the ate may confer upon it the power of summary batement in case of emergency.[39]

81. **Safety.**—The safety of life, limb and prop-ty being one of the prime objects of municipal in-rporation, all appropriate regulations tending to romote this object are within the police power dele-ated to a municipality. Municipal corporations are, herefore, authorized, in the exercise of police power, enact such ordinances and employ such necessary eans as will insure safety to the private property s well as the persons of its citizens. Fire has been ecognized as the greatest municipal peril, and meas-res to prevent the rise and spread of conflagrations re universal.

A city may, therefore, prescribe fire limits and for-id the erection of wooden buildings therein.[40] A city ay also pass ordinances prescribing the maximum uantity of gunpowder, dynamite, nitroglycerin, hay, xcelsior, or other combustible or inflammable mate-al which may be stored in one place or kept in one ouse in the city. It may also prescribe and enforce he construction of fire escapes on all buildings not trictly private. Ordinances may also be enacted rescribing safe chimneys, flues, and furnaces, and egulating the handling of coals, ashes, and the like; nd, indeed, any other reasonable regulation to pre-ent and extinguish fires.

The supreme exercise of police power by a munici-ality for public safety is displayed in razing, in case

[39] Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830.
[40] State v. Johnson, 114 N. C. 846, 19 S. E. 599.

of emergency, valuable private property to prevent the spread of conflagration. This may be done without incurring any liability whatever to the owner, unless compensation has been provided by statute; the rule at common law being that the state might destroy, though it could not take private property without compensation.[41]

Another source of danger to public safety in a city is rapid locomotion in or across the streets thereof. Municipalities have authority to regulate the movement not only of railroad trains, street cars, omnibuses, hacks, automobiles,[42] but also individuals moving on horseback, bicycles, and other vehicles, and likewise to regulate the movement of water craft in the waters over which they have jurisdiction. Municipal ordinances have been sustained which restrict the running of trains within corporate limits to four miles an hour, require flagmen to be kept at street crossings, and those requiring a conductor on each street car, and many similar ordinances regulating speed and movements within the municipal jurisdiction whereby collisions may be avoided and human life and property saved from needless injury or reckless destruction.

Whatever causes public discomfort or inconvenience or immorality is subject to the police power. It has accordingly been held that a municipality may prohibit public profanity, street preaching, public drunkenness, carrying of concealed weapons, rock blasting, vagrancy, cruelty to animals, Sabbath

[41] Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830.
[42] Whitson v. Franklin, 34 Ind. 392.

reaking, destruction of public trees, steam whistle lowing, and the running at large of animals.

82. **Occupations and amusements.**—The city possesses no power to prohibit a useful business or a armless amusement; but all manner of occupations nd amusements are subject to reasonable regulation y the state or the municipality exercising the delegated police power. A city may prohibit the keeping f a house of ill fame, or the leasing of property for hat purpose;[43] and so, also, for gambling or liquor elling, if authorized by charter; or, if these practices are not forbidden, the city may adopt and enforce stringent regulations for them. It may prohibit the sale of liquors and wines at places of musical r dramatic entertainment where females act as waiters, and may fix hours for closing and opening saloons, and forbid admission of minors or females; nd in general the municipality may enact such ordinances as will tend to prevent such places from degenerating into nuisances or breeding disorder and rime.[44]

Ordinances requiring licenses from peddlers, lumbers, auctioneers, bakers, draymen,[45] hackmen,[46] green grocers, pawnbrokers, milk dealers,[47] illiard saloons, livery stables, showmen, hucksters, awyers and doctors,[48] bankers, junk shops, telegraph

[43] Childress v. Nashville, 3 Sneed 347 (Tenn.).
[44] Mankato v. Fowler, 32 Minn. 364, 20 N. W. 361.
[45] Brooklyn v. Breslin, 57 N. Y. 591.
[46] St. Louis v. Weitzel, 130 Mo. 600, 31 S. W. 1045. See Mason v. Cumberland, 92 Md. 451, 48 Atl. 136.
[47] Norfolk v. Flynn, 101 Va. 473, 62 L. R. A. 771, 44 S. E. 717.
[48] Young v. Thomas, 17 Fla. 169, 35 Am. Rep. 93; Savannah v. Charion, 36 Ga. 460; Elliott v. Louisville, 101 Ky. 262, 40 S. W. 690.

companies,[49] natural gas companies, pharmacists, have been held valid under the police power.

The municipal corporation possesses no inherent power over the liquor traffic, but only the express and implied powers conferred by the charter. Wherever the power of regulation is conferred, the municipality may require a license, may forbid the employment of women in the traffic, may confine sales within reasonable hours and within prescribed territorial limits, and may regulate the traffic by other wholesome restrictions.[50]

83. **Markets.**—The establishment and regulation of municipal markets are a proper exercise of the police power for the convenience, health, and general welfare of the municipality. A municipal market is a designated place in a town or city with convenient fixtures for the sale of provisions and articles of daily consumption, with proper regulations and officers, where all persons may lawfully go for the purpose of buying or selling.

In America the establishment and regulation of markets is generally granted by charter; and after much contention it has been generally decided that the city may prohibit the sale of fresh meat, vegetables, and other provisions elsewhere than in the public market, upon the ground, as stated in a leading Louisiana case, that "the privilege of keeping a private market is subordinate to the right existing

[49] Allentown v. Western Union Tel. Co., 148 Pa. 117, 33 Am. St. Rep. 820; Hodges v. Western Union Tel. Co., 72 Miss. 910, 29 L. R. A. 770.

[50] Giozza v. Tiernan, 148 U. S. 657; Decie v. Brown, 167 Mass. 290; Provo City v. Shurtliff, 4 Utah 15, 5 Pac. 302; Metcalf v. State, 76 Ga. 308; Ex Parte Hayes, 98 Cal. 555, 33 Pac. 337, 20 L. R. A. 701.

a the sovereign to exercise the police power to egulate the peace and good order of the city, and o provide for and maintain its cleanliness and alubrity."[51]

84. **Enforcing regulations.**—Violations of police egulations are usually punished by a court proceed- ng in personam for the recovery or enforcement of ne affixed penalty, but in many cases the police ower is enforced in rem in a summary manner. For xample, a city council has power to confer upon the oard of health authority to demolish a house in- ected with smallpox as a nuisance dangerous to the ublic health.[52] So, also, a city may order a wooden ouse to be torn down which is built within the fire mits in defiance of the ordinance forbidding it;[53] nd, as we have seen, the municipal corporation, ithout either statute or ordinance, may cause a rivate building to be demolished to stop conflagra- on.

A ferocious dog, or any other kind of animal *amage feasant* in a municipality, may be killed, if ecessary; also a vagrant dog, unmuzzled, and ad- icted to biting, though doing no harm at the time, nay be summarily killed as a measure of precau- on.[54] In some states, too, the police are authorized o kill all unlicensed dogs wheresoever found. Sim- ar to this is the summary arrest and confinement by he police in the lockup of persons of the drunk and isorderly class, and the use of force, even to mayhem

[51] City of New Orleans v. Stafford, 27 La. Ann. 417, 21 Am. Rep. 563.
[52] Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830.
[53] Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608.
[54] Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175.

or death, if necessary, to disperse a mob or quell a riot.[55]

85. **Streets.**—"Street" is a generic term usually employed to describe any public highway, whether improved or unimproved, lawfully established and opened in a municipality to the public use for travel and traffic. In its legal acceptation, this word embraces not only streets, but also avenues and alleys. The term is used to describe any public road inside municipal boundaries, but does not properly embrace rural or suburban roads. Whenever duly established and opened, such a road becomes a street, whether it is worked upon and improved, or left in its natural state. It is dedicated to the public and accepted and held by the public for the use of trade and travel, and may not be perverted to other uses.[56]

86. **Legislative control.**—The supreme power over streets as public highways for the public use is inherent in the state. The state holds all public powers and utilities in trust for the public welfare, including those within as well as those beyond municipal boundaries. Within constitutional limitations, it may determine when, where, and how streets, or other public highways, shall be opened, graded, improved, and regulated; and, also, when and how vacated or closed.[57]

The legislative control over streets may be, and

[55] Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505; Stewart v. New Orleans, 9 La. Ann. 461, 61 Am. Dec. 218.

[56] Dexter v. Tree, 117 Ill. 532; Townsend v. Epstein, 93 Md. 537, 52 L. R. A. 409, 86 Am. St. Rep. 441; State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117.

[57] Peters v. St. Louis, 226 Mo. 62, LEADING ILLUSTRATIVE CASES.

enerally is, delegated to the municipality, and the ower is thus conferred upon it to open, grade, im- ove, regulate, and close its own streets.

The grant, usually expressed in general terms, is to e city to lay out, open, grade, and otherwise im- ove streets and keep them in repair; or to have ower over its streets; or to have the care, super- sion, and control of its streets. These general grants authority by the state over the city's own streets, its duly authorized general agent, to do whatever e state might do in controlling them, are held to nfer plenary powers upon the municipality.

87. **Dedication and acceptance.**—Dedication of roperty for street uses may be made by any legal or quitable owner, either in writing or orally, or by onduct or acquiescence in public use, such as will uffice to estop claim to the contrary.

A dedication consists of both act and intention, nd may be either express or implied: express when e owner, either in writing or by parol, declares his tention to donate and surrender the property to e use of the public; implied, as when this intention signified by a public platting of property and lots ith open spaces apparently for street uses, or when e public for a long time uses the property for a reet with the knowledge of the owner, and without is objection.[58]

88. **Use of streets.**—The primary use for which reets are dedicated is free and unobstructed pas- ge over them; but this use may be modified or tem-

[58] Cohoes v. Delaware, etc., Canal Co., 134 N. Y. 397, LEADING ILLUSTRATIVE CASES.

porarily obstructed under municipal authority for other necessary and appropriate municipal purposes, not inconsistent with, or destructive of, the primary use of public travel.

Such obstruction must be reasonable, and not so long continued as to prove a nuisance. The municipal license will not protect the licensee from liability for damages to any abutting owner suffering special injury from the obstruction. And for the protection of the public the city may require that the owner or contractor erecting a building shall build a covered passway over the sidewalk.

The municipality may also authorize the use of streets for telegraph, telephone, and electric service, for street and commercial railways, and may allow below the surface the laying of gas, water, and sewer mains and pipes, and the construction of subways. Poles may not be planted or wires strung for electric use in the streets without express consent of the municipality; and it may not grant this privilege unless thereunto expressly authorized.

The municipality having control of its streets below as well as above the surface, may, therefore, grant to public service corporations the right to lay pipes and mains and to construct subways for all proper municipal purposes. These may include not only pipes and mains for water, gas, and sewage, in case the city has no public system, but may also include conduits for electric wires and subways for railroads.

If electric wires become so numerous as to impair the public safety, the municipality may require that

ney shall be taken off the streets and placed below ne surface.

The power of a municipality to authorize the con- ruction of street railways in its streets has been horoughly established and uniformly recognized; but ne city may impose such conditions as the safety of ne public or the welfare of the municipality may equire, not only at the time of granting the privilege, ut also thereafter, in the exercise of the police pow- rs; and for a breach of these conditions, franchises ay be declared forfeited by the court.

Possessing paramount power over streets the state ay vacate them, or authorize their vacation by the unicipality; but the vacation must be for public, ot private, benefit. Abutters have peculiar rights n streets, and may not only stand surely upon "due rocess of law" for protection, but may also insist pon the constitutional right to compensation for ne appropriation of their easement of access to the ublic use.

89. **Abutting owners.**—An abutting owner shares n all the rights of the general public, and, in addi- ion thereto, has such special rights as arise from his roperty abutting on the street. Among these is the ight of free and unimpeded ingress and egress to nd from his property, even though he may thereby ause temporary inconvenience to the public in gen- ral. The convenient use of property, in urban com- unities, is dependent upon connections with sewer, ater and gas pipes, which may not be denied.

An abutting owner has at common law no right to ateral support of street soil, and none can be acquired

by prescription or lapse of time; so, though the street grade may be changed so that his fences fall, he has no action therefor.

If additional burdens are imposed upon a street, abutting owners are entitled to compensation, if damaged; and this notwithstanding the fee is in the public, or the municipality for public use. They may recover damages for the construction of a common traffic railroad, but not for a mere street railway, whether operated by cable, electric, or horse power.

The abutter has no right to project his buildings, or any part thereof or attachment thereto, over the street line, without municipal consent; but a city may permit abutters to extend balconies, bay windows, awnings, or signs into streets.

90. **Sewers.**—The construction of sewers is an inherent municipal function for sanitary purposes, and may be imperatively imposed upon a municipality by the state.

Unless the duty is positively imposed by the state, the municipality has discretion to determine whether it will construct a system of sewers, and also the nature and cost of the system. This function is legislative, and the municipality cannot be held liable for failure to exercise it, and thus provide a system of its own, or for mistake made in the choice of the systems offered.

The municipality may, of course, use the streets for the construction of a sewerage system, and it has been held that it has also the power of eminent domain over other property for this purpose.

It is competent for the city to assess the expense of

uilding a sewerage system for a certain street gainst the abutting property, and to require all ersons residing on the street to connect with the ewer. No property-owner can be prevented from apping a municipal sewer.

A sewer being once completed, it is the imperative unicipal duty to see that it is properly cared for; nd for failure to perform this function the municiality may become liable in damages.

91. **Parks.**—Public parks and squares are proper bjects of municipal concern, as means for the promotion of public health and comfort; and property ay be acquired and held by a municipality for these cognized purposes.

Public parks, such as Hyde Park and Bois de oulogne, and public squares, such as Trafalgar quare and the Place de la Concorde, have long been cognized and maintained as municipal attractions nd conveniences for the inhabitants and sojourners f a city. Recognizing these as an important public se, the states have generally conferred upon municpalities the sovereign power of eminent domain for he purpose of condemning property for the public se in parks and squares, and have often authorized is to be done beyond the limits of the municipal rporation.

But though parks and squares are recognized as public use, they are matters of municipal rather han governmental concern, and their establishment s within the discretion of the municipality.

It is obvious that the city may accept land dediated for public parks and squares, and appropriate

money out of the municipal treasury for its improvement. A city cannot authorize the erection of any private building in a public square or park—not even a railway station or depot—and a lease of a park for private use is void. Ways may be opened through a park for pleasure driving and riding, like Rotten Row in Hyde Park; but they may not be used for traffic purposes.

The city may permit and provide for the erection of monuments, fountains, art galleries, and zoological buildings, and may pass ordinances for the protection of animals and birds therein.

92. **Public buildings.**—Public buildings are essential for municipal purposes, and the power to acquire land therefor, and erect and maintain necessary buildings thereon, is inherent in the municipal corporation. The city council possesses inherent power to provide appropriate room for its own meeting, and for the transaction of the necessary municipal business. Also, it must provide a proper place for the detention of municipal prisoners, and the proper housing and protection of its fire apparatus. And in general the municipality has implied power to erect and maintain any necessary public building.

CHAPTER VI.

TORTS.

93. **Corporate liability.**—A municipal corporation may be liable to a civil action for a wrong committed or permitted by it causing private injury.

A municipality, being created by the state and endowed with certain functions for the public welfare, must perform those functions, or suffer indictment for its nonfeasance or misfeasance. Also, being a member of society, and empowered not only to exercise governmental functions, but also to own property and to deal with other corporations and with natural persons upon terms of equality, the municipality must respect the law not only in its contracts, but also in its non-contract relations with others; and where anyone suffers an injury by the neglect of the municipality to discharge any absolute duty, such person has an action against the municipality for the redress of the injury.[59]

94. **Governmental duties.**—No action lies at common law against a municipal corporation for an injury resulting from the performance or non-performance by it of a purely governmental duty. In its strictly governmental character a municipality closely resembles a quasi-corporation, and in this aspect the law for it is practically the same as for a

[59] Rowland v. Kalamazoo Supt. of Poor, 49 Mich. 553, 14 N. W. 494; Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185.

quasi-corporation as to the reason and extent of its exemption from liability for injuries suffered by others. It is performing a public function—discharging a governmental duty of the state for the public welfare; and out of this no action can arise unless given by statute.[60]

Prominent among these governmental functions are: (1) The preservation of the public peace; (2) the preservation of the public health; (3) punishment of criminals; (4) preventing destruction by fire; (5) furnishing public education; (6) providing for the poor. Accordingly, a city is not liable for negligence or misconduct of its police officers,[61] for they are state officers, rather than municipal; it is not liable for failure to disperse a mob or suppress a riot. Nor is a city liable for the misconduct of its health department, or any of its health officers, since sanitation is a public, rather than a municipal, duty. And, since the maintenance of public peace and enforcement of good order may require the punishment of evildoers by a municipality, it is the general doctrine that no action will lie against the corporation for the negligence or misconduct of its officers in the confinement or punishment of criminals. The courts agree that it is a governmental duty to stop conflagrations, and that a municipality cannot be held liable for either the negligence or misconduct of its fire department, or any member thereof; also, that a city cannot be

[60] Dargan v. Mobile, 31 Ala. 469, 70 Am. Dec. 505, LEADING ILLUSTRATIVE CASES.

[61] Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332; Taylor v. Owensboro, 98 Ky. 271, 56 Am. St. Rep. 361, 32 S. W. 948; Whitfield v. Paris, 84 Tex. 431, 15 L. R. A. 783, 31 Am. St. Rep. 69; Easterly v. Irwin, 99 Iowa 694, 68 N. W. 909.

held liable for the failure to provide adequate fire apparatus or sufficient water to extinguish fire. So, also, it is held that no action will lie against a municipality for injury resulting from the negligence or misconduct of any of its agents or employees in connection with its public school buildings.

No private action will lie against the city either for failure to enforce its own laws and ordinances,[62] or from its action or non-action in any other matter resting in the discretion of the corporation as a governmental agency; and so damages have been refused for injuries resulting from forbidden fireworks,[63] from a public nuisance, for failure to build sewers or drains, from the adoption of a defective plan of sewerage, and from doing or failing to do any act not ministerial, but legislative or judicial in character.

95. **Municipal duties.**—A municipality, in the exercise of its purely municipal functions, is subject to the same rules of liability for torts as a private corporation.[64]

To illustrate, if a town or city maintains a structure which is a nuisance and causes special damage to private parties, or if in the performance of an authorized act the municipality invades any property right, the corporation is liable.

In an early New York case,[65] which has been quoted with approval both in England and America,

[62] Fowle v. Alexandria, 3 Pet. 398 (U. S.).

[63] But they were allowed in the leading case of Speir v. Brooklyn, 139 N. Y. 6, 21 L. R. A. 641, 36 Am. St. Rep. 664, 34 N. E. 727.

[64] Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302, LEADING ILLUSTRATIVE CASES.

[65] Bailey v. Mayor, etc., of New York, 3 Hill 531 (N. Y.), 38 Am. Dec. 669, LEADING ILLUSTRATIVE CASES.

the doctrine of liability of a municipality in regard to its quasi-private real property was thus stated: "The citizen and the municipal body, in respect to their several possessions of real estate, stand upon a footing of equality. Neither is the privileged owner, and each must fulfill the same duties in respect to the other. * * * If the grant is for the purpose of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation quoad hoc is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchise had been conferred." This rule has been applied to a poor farm kept by a municipality, and also to a city cemetery yielding profit to the municipality. The same rule has also been applied to a municipality owning or controlling wharves, docks, and piers, and also where the city supplies water or light for compensation; and so where it maintains a public market. And this rule seems to apply to any business undertaken by a municipality under its charter powers. It is then a corporation organized for profit, and justly subject to the same rules as a private corporation.

96. **Municipal performance of governmental duty.** —A municipality, when charged in its corporate character with the performance of a municipal function in regard to governmental affairs, is, by the preponderance of judicial opinion, civilly liable for injuries resulting from misfeasance or nonfeasance of such municipal duty.[66]

[66] Mills v. Brooklyn, 32 N. Y. 489, LEADING ILLUSTRATIVE CASES.

The prevailing view of the courts in America is that for a failure to discharge the duty to keep streets in repair there is an implied common law liability for resulting injury resting upon every chartered municipality. After long contention in the federal courts this doctrine was at last authoritatively adopted by the Supreme Court of the United States in the leading case of Barnes v. District of Columbia;[67] and this view is also maintained in the states of Alabama, Colorado, the Dakotas, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Montana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, and West Virginia. Under the lead of Massachusetts, where this subject has been often and ably considered,[68] the following states have adopted the contrary view: Arkansas, California, Connecticut, Maine, Michigan, New Hampshire, New Jersey, Rhode Island, South Carolina, Vermont, and Wisconsin. The Supreme Court of the United States recognizes its duty to follow the decisions of the highest court of each state in regard to municipal liability for tort therein.[69]

97. **Reasonable care of streets.**—The common law requires every municipal corporation to exercise reasonable care to make and keep its streets safe for all ordinary uses for which they are opened to the public. A municipality is not an insurer of public safety

[67] 91 U. S. 540, 23 L. Ed. 440.
[68] Hill v. Boston, 122 Mass. 344, 23 Am. Dec. 332.
[69] City of Detroit v. Osborne, 135 U. S. 492.

on its streets. It owes the public only the duty of reasonable diligence to keep its streets in such condition that the public, by exercising like diligence, may use them for all lawful purposes with reasonable security. A failure to perform this duty will render a municipality liable for the damage occasioned thereby.

For an injury occurring to any person from the apparent neglect of the municipality to keep its streets in repair, two defenses are open, which are generally recognized as sufficient: (1) That the city had no notice, actual or implied, of the existing defect; (2) the lack of any corporate fund and of any power to obtain one applicable to repairs has also been recognized as a good defense.

What is reasonable care is a question of fact depending upon the circumstances of each particular case. The degree of repair of a street is a matter of municipal discretion. The standard of repair may well be different in various localities. But it has been held that the municipality must use such care as will protect not only the busy traveler and pedestrian, but also the playing child and even the idle loafer.[70]

98. **Obstructions.**—Reasonable care of the streets also requires of the municipality the removal from them of unlawful obstructions and the signaling of dangerous ones.

[70] City of Waverly v. Reesor, 93 Ill. App. 649; City of Omaha v. Richards, 49 Neb. 244, 68 N. W. 528 (where the city of Omaha was held liable for the death of a boy who fell through a section of a sidewalk which he was using as a raft on a pond of water that had accumulated over a street and adjacent private property because of the city's negligence in constructing a storm sewer).

The temporary and partial obstruction of a street may be permitted by the city when necessary for building, removing, improving, or commerce; but such work must obviously be performed with dispatch and care, and municipal consent must be obtained for the obstruction. Whenever and wherever it is permitted, it is a municipal duty to give reasonable warning to the public, both day and night, of the presence of danger, to the end that it may be avoided. Hitching posts, electric poles, stepping stones, and hydrants are not regarded as unlawful obstructions when placed at the curbstone or margin of the street, so as not to render the way unsafe; but such things placed either with or without municipal consent within the portion of the street commonly used either for riding, driving, or walking, and not properly guarded or signaled, will give action against the municipality to one injured thereby. Recoveries against a municipality have also been sustained because of its failure to remove or properly signal as obstructions to the street an ash pile, a motor, a steam roller, machinery, a furnace, a tent, building material, a hydrant, logs, rocks and stones, and also dangerous holes and excavations in or near the street, and objects naturally tending to frighten horses ordinarily gentle.[71]

99. **Sidewalks.**—Sidewalks under municipal control are objects of the same reasonable municipal care as other parts of the street, and an action will

[71] Even where a horse of ordinary gentleness merely shies, so that the driver does not lose control of him, but is injured by coming in contact with an obstruction in the street, the city is liable; Burnes v. St. Joseph, 91 Mo. App. 489.

lie for injuries resulting from nonfeasance or misfeasance of this municipal duty. It is immaterial whether the municipality has built the sidewalk. Being a part of the street, it is under municipal control, and the corporation will be liable for neglecting to exercise ordinary care to keep it reasonably safe. The duty is an active one, beginning with the construction of the walk and continuing thenceforth as long as it remains under municipal control. If it be the duty of the abutter to make repairs, the municipality is not relieved from liability by notice given to the abutter. The walk must be made safe within a reasonable time, or the municipality will be liable for damages occurring from its being out of repair.

Hatchways and similar entrances from sidewalks to cellars are necessities in urban life, but the city must take care that such things do not become dangerous to pedestrians. If basement steps are necessary and permitted in a sidewalk, they must be guarded with suitable railing; and the doors or lids of hatchways or coal chutes must be safe and strong so as to protect pedestrians from danger. The municipal duty of reasonable care applies equally to objects above the sidewalk, such as signboards, poles, and awnings.

Ice and snow. The presence of ice and snow upon streets and sidewalks requires only reasonable care. Statutes have been passed in the New England States prescribing the measure of municipal duty; but such statutes, of course, are of local application only, and are not enacted in the Southern States. The only rule of general application, therefore, must be that

f reasonable care in view of climatic and other onditions.[72]

100. **Bridges and viaducts.**—All viaducts and ridges within a municipality are parts of streets, nd objects of the same degree of municipal care. nless required by mandatory statute, the construc- on of a bridge by a municipality is within its dis- retion; and, the location of a bridge being a gov- rnmental function, the municipality is not liable at ommon law for injury resulting therefrom. A mu- icipal corporation is not liable for injuries resulting rom the negligence or erroneous judgment of its fficers or agents in the performance of, or omission o perform, duties which are purely discretionary,[73] uch as opening or closing a street, changing a rade, locating a crossing, or even suspending a gen- ral regulation for the temporary convenience or leasure of a portion of its people.

But after the discretionary function of location has een performed and the municipality enters upon the usiness of construction, it enters the field of minis- erial functions, and may become liable for failure to xercise reasonable care to place proper guards and ailings around the bridge approaches during the onstruction, and also on the approaches and bridge tself after it is completed, so as to protect persons pon the bridge exercising ordinary care. It must se due care to erect and maintain a reasonably safe tructure, and generally is liable for failure to per-

[72] Mauch Chunk v. Kline, 100 Pa. 119, 45 Am.. Rep. 364.

[73] Howsmon v. Trenton Water Co., 119 Mo. 304, 24 S. W. 784, 23 L. R. A. 46, 41 Am. St. Rep. 654.

form, or for negligent performance of, its duty in regard to bridges, under the same rules as are applicable to streets. This includes the duty of reasonable inspection and notice of danger; and for failure to exercise these duties municipalities have been held liable for defect in the floor, in the railings of a bridge, and for failure to close or warn the public of a dangerous bridge.

101. **Drains and sewers.**—A municipality may also be liable for misfeasance or nonfeasance in the performance of its duty to exercise reasonable care in the construction and maintenance of its drains and sewers. It is well settled that in deciding to build sewers and in choosing a plan the municipality is exercising governmental discretion, and therefore incurs no liability for the negligence or mistakes of its agents; but a municipality is liable for damages resulting from its neglect to discharge properly its ministerial duty to exercise reasonable care in the construction and maintenance of its sewers. Even the New England States, and others, denying municipal liability for defective streets, generally recognize and enforce this rule with regard to sewers. The true ground of responsibility for negligence in the care of sewers seems to be the same as in the care of highways, namely, the corporation has neglected its municipal duty to exercise reasonable diligence in the care and management of property under its control. Municipal ownership is not essential to liability; municipal control will be sufficient. And it has been held that when a sewer runs partly through private and partly through municipal

property the corporation is liable for the entire damage done by overflow at its outlet; also that a municipality is liable for damages sustained by individual owners from the flooding of their premises by drains or sewers; and from the depositing of sewage upon their lands, though this be a necessary result of the plan adopted. So, also, damages may be recovered by private action for the pollution of a stream by sewage so as to render the water unfit for use by the riparian owner or occupier; and in some cases the municipality has been enjoined from emptying its sewage into a running stream, whereby a public nuisance was created.

102. **Respondeat superior.**—The liability of the municipal corporation in most cases of tort rests upon the doctrine of the common law that the master is liable for the wrongs done by the servant when acting within the scope of his employment. Obviously, there can be no liability for tort unless there has been a violation of some municipal duty; nor can a corporation be held liable for the acts of officers whom it does not control. But the corporation may be liable for the conduct of officers not appointed by it, but by the state for it.[74] "For the acts of an independent officer, whose duties are fixed and prescribed by law, the city cannot be held chargeable upon the principle of respondeat superior, for the relation of master and servant does not exist. Such officers are quasi-civil officers of the government, even though appointed by the corporation. But an excep-

[74] Bailey v. Mayor, etc., of New York, 3 Hill 531 (N. Y.), 38 Am. Dec. 669, LEADING ILLUSTRATIVE CASES.

tion to this rule exists when the corporation is under an absolute duty to perform the acts which are devolved upon such officers, or when the corporation, as such, derives an immediate profit and advantage therefrom."[75]

103. **Ultra vires.**—A municipal corporation is not civilly liable for damages suffered by individuals in person or property which are caused by the tortious acts of municipal agents or officers assuming to represent it in matters wholly beyond its powers.

A municipal corporation cannot confer upon its agents or officers lawful authority to represent it beyond the scope of its charter powers. For the malfeasance of agents or officers of the corporation in assuming to do acts which are entirely beyond the municipal powers and purposes, and cannot, therefore, be lawfully authorized by the municipality, the corporation cannot be held liable in damages to persons suffering injuries therefrom. This logical doctrine, based upon elementary principles of the common law, received general, if not universal, recognition in America by the concurrent decisions of the courts for almost a century.

Salt Lake City Case. The stability of this doctrine of the law is supposed to be shaken by the decision of the Supreme Court of the United States in the unique case of Salt Lake City v. Hollister,[76] wherein Mr. Justice Miller, in delivering the opinion of the court, said: "The truth is that, with the great increase in corporations in very recent times, and in

[75] Wood, Master and Servant, § 463.
[76] 118 U. S. 256.

their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers, who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi-criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."

An examination of this case shows the foregoing language of Mr. Justice Miller to be an obiter dictum. Salt Lake City, having erected a distillery, proceeded without authority to engage in the business of distilling spirits, and while so doing, in violation of the United States revenue laws, made fraudulent returns of the quantity of spirits produced. Its fraud was detected, and the city, to save its property, paid the tax under protest, and then brought action against the collector to recover the amount so paid. The ground of its action was that the business of distilling spirits by Salt Lake City was ultra vires. The very impudence of the contention provoked the court to pungent ridicule of the plaintiff's action, and naturally strong language was used in refuting its absurd contention and denying its demand. But the question in the case was not whether a municipality is liable in a civil action to an individual injured by the tortious acts of its agents or officers ultra vires, but only whether it could recover from the government a sum of money paid under protest to avoid seizure of its property for a lawful tax and pen-

alty. The gist of the decision is found in the following excerpt from the opinion: "A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally; and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the government on such business or transaction by whomsoever conducted."

The fundamental rules of law upon which a person or corporation becomes liable for a tax are so widely different from those which declare liability for a tort that even these cogent words of Justice Miller, used argumentatively in the decision of a revenue case, are not likely to unsettle the logical rule as to torts to private individuals established by the concurrent decisions of courts of last resort through scores of years in the United States.

CHAPTER VII.

DEBTS, FUNDS AND TAXES.

104. **Municipal indebtedness.**—Within the scope of its charter powers, a municipality, in the exercise of corporate functions and transaction of municipal affairs, may incur indebtedness to any extent not forbidden by law.

Clothed with the power of eminent domain, and the inherent power to contract, and required to exercise police powers (some of these at its peril), a municipality must necessarily incur large expense, the amount of which, under the American rules of local self-government, properly rests in the discretion of the municipality; and, in the absence of constitutional or statutory limitations, this discretion as to amount is unbounded.[77] The law is, however, imperative that to constitute a valid indebtedness, the expenditure must be incurred within charter powers and for municipal purposes.

105. **Debt limitation.**—Limitation to municipal indebtedness may be fixed either by statute or constitution, beyond which no obligation can be incurred by the municipality.

The limit is usually fixed at a certain per cent. or aliquot part of the total assessed value of real estate, or real and personal property, in the corporate

[77] Coggeshall v. Des Moines, 78 Iowa 235, 41 N. W. 617; City of Galena v. Corwith, 48 Ill. 423, 95 Am. Dec. 557.

limits. The form of constitutional inhibition is usually such as to prevent either the legislature or the municipality from passing the constitutional limit; in which case all indebtedness, howsoever incurred, beyond this limitation is void. Limitation may also be fixed in the charter, or by general statute, which cannot be transgressed by the municipality; but such boundary when fixed by the legislature may likewise be transgressed by the same body, and indebtedness beyond the statutory limit may be imposed upon the municipality by the legislature.

The recognized classes of municipal indebtedness are two, (1) bonded and (2) current. The weight of authority favors such strict construction of these statutory and constitutional prohibitions as will include both classes of debts, and thereby protect the citizens from overburdensome taxation.[78]

106. **Municipal bonds.**—Municipal bonds are now generally understood to mean negotiable bonds issued by a municipality as security for its indebtedness. Municipal bonds are not necessarily negotiable. But the term "municipal bonds" in modern parlance imports negotiability. They are generally issued as security for a loan of money to the municipality. But sometimes they are used to subsidize some undertaking of advantage to the municipality such as a railroad, gas, water, or electric company.

Express power to incur indebtedness by borrowing money on the municipal credit may be conferred upon a municipal corporation either by charter or by gen-

[78] Laporte v. Gamewell Fire Alarm Tel. Co., 146 Ind. 466, 35 L. R. A. 686, 58 Am. St. Rep. 359.

l law. Like power may also be implied as appro-
ate and necessary for the proper and efficient ex-
ise of the municipal powers expressly conferred
on the corporation. Lacking express or implied
wer for such purposes, a municipality does not pos-
s inherent power to incur municipal indebtedness
borrowing money on municipal credit.

Until the era of municipal extravagance had come
America, municipal corporations had been wont to
row money, and give their notes or bonds therefor,
thout serious doubt or question as to the existence
source of such power. But upon recent challenge
has been declared in the Supreme Court of the
ited States that the power to borrow money is not
incidental and necessary power of a municipal cor-
ration; and that to create a valid indebtedness
money borrowed by a municipality there must
ist either express authority, or the same must be
arly implied from granted powers.[79] To this view
s been added the great weight of the opinion of
dge Dillon,[80] and the concurrence of some of the
te supreme courts, and the preponderance of judi-
l opinion is now against the inherent power of a
nicipality to borrow money.

107. **Power to issue bonds.**—Authority to issue
nicipal bonds, though not inherent in a municipal-
, may be expressly conferred by the legislature,
may be implied as necessary to the exercise of the
press powers. This power to issue negotiable
per will be implied from the express power to bor-

[79] Mayor of Nashville v. Ray, 19 Wall. 468 (U. S.), 22 L. Ed. 164.
[80] 1 Dill. Mun. Corp., § 125.

row money; but the courts have been generally averse to any such implication where the bonds are to be used as municipal aid to the construction of a railroad, either by subscription to stock or purchase of bonds. Usually the statute authorizing the issuance of such bonds provides for a submission of the question to popular vote, and authorizes their issuance only when favored by a majority of the electors or taxpayers of the municipality.

Municipal bonds, being generally issued for the purpose of obtaining a loan of money on favorable terms, are made payable to bearer and pass by delivery. They are therefore held free from all equities which might exist in favor of the corporation, and the only defense open to the municipality is want of authority for their issuance. Unauthorized bonds are void, and cannot be validated.

Estoppel cannot save them even in the hands of a bona fide holder for value without notice of the want of power.

When the want of authority is due to the illegal exercise of possible authority (as issuing bonds without an indispensable popular vote favoring it), false recitals in the face of the bond that the conditions have been complied with estop the municipality to deny compliance when sued by a bona fide holder. Such irregularities may be cured by express ratification or long continued acquiescence and recognition.

108. **Municipal warrants.**—The current indebtedness of the municipality is usually evidenced by the warrants or orders, which the municipality has the inherent power to issue through its officers. Mu-

cipal orders or warrants are informal checks by ne municipal officer upon another for the payment f a certain sum of money. These warrants are sually not negotiable, and do not bear interest. hey are not intended to be used as currency, though ney are assignable; but in the hands of any per- on the city is entitled to all equities against the riginal payee.

109. **Funds—Creditors.**—Municipal revenues are sually divided into funds which represent the vari- us sums of money appropriated by the council for ne payment of specified kinds of indebtedness; e. g., school fund, interest fund, street fund, sinking und, and the like. The warrants of the municipality re usually drawn upon some special fund, and are o be paid out of that fund in the order in which ney are presented and accepted by the disbursing fficer. If the fund be exhausted, such warrant is ot then payable out of other money in the municipal reasury, but may be payable out of the same fund he following year.

Creditors may by contract obtain a vested interest n municipal funds so that the same cannot be taken rom them either by municipal or legislative action. t often happens in the administration of municipal ffairs that contractors doing work of improvement or the municipality have been promised compensa- ion out of certain municipal funds; or that a loan f money has been obtained upon the credit of some pecific municipal fund; or that creditors of the unicipality have been induced to refund their ex- sting obligations at a lower rate of interest, or even

to reduce the principal of the debt, upon guaranty of payment out of some specific source of municipal revenue. In all such cases, unless the fund pledged is strictly governmental in its nature, so as to be incapable of being pledged, the creditor obtains a vested interest in the fund, which is protected by the contract clause of the Federal Constitution; and his right cannot be impaired by subsequent legislation, either by the state or the municipality. Sinking funds have been held to be peculiarly within the protection of this constitutional provision, and any legislation void which tends to impair the creditor's contractual security.[81]

110. **Expenses.**—Municipal expenses include all such items as are incidental to the proper exercise of corporate functions in administering the government of the municipality, and, if within the scope of the municipal powers, are within the discretion of the governing body. For example, a stenographer's fees for reporting, under the direction of the city attorney, the trial of a case against a police officer, is a proper item of municipal expense, though the city was not a party to the suit, since such matters must be left to the discretion of the city attorney, and he was acting within the apparent scope of his authority.[82] But the discretion vested in the council will not validate a claim for items of expenditure obviously not municipal, such as giving banquets, providing entertainment for guests,[83] buying

[81] Kelly v. Minneapolis, 63 Minn. 125, 65 N. W. 115, 30 L. R. A. 281.
[82] City of Chicago v. Williams, 80 Ill. App. 33.
[83] Black v. Detroit, 119 Mich. 571.

itary uniforms, expenses of delegates to a municipal convention, and the like.

11. **Budget.**—A classified statement of annual propriation of municipal revenues, commonly led a budget, is required in many states, as the asure of lawful municipal expenditures during the ar. The object of this budget is to ensure an derly, systematic, and economical administration municipal affairs, and the executive officers of the nicipality are required to conform their operams to this budget, and limit their expenditures to e sums appropriated to the various departments kinds of municipal work.[84] It has been held that warranted expenditures for municipal objects may ratified by the council, and a claim therefor be us validated.[85]

112. **Municipal claims—Appropriation.**—Claims ainst a municipality ex contractu do not become tionable until after due and regular presentation d demand for payment, and refusal by the proper icer. In the management of municipal affairs me officer is intrusted with the duty of auditing ims; and when the claims are approved, or an cord has been reached, warrants are drawn for payent upon the municipal treasury. After such warnt has been presented and payment refused, and t before, the claimant has a right of action thereon;

[84] The amount placed on the budget for the annual expenses of a municicorporation when collected by taxes levied therefor must be applied to the poses specified in the budget; Badger v. New Orleans, 49 La. Ann. 804, L. R. A. 540.

[85] Barrett v. Mobile, 129 Ala. 179, 30 South. 36, 87 Am. St. Rep. 54; ls v. Gleason, 11 Wis. 470, 78 Am. Dec. 721.

but the warrant is not conclusive upon either party. The municipality may defend against the warrant upon the ground that the claim was ultra vires, fraudulent, or unfounded; and the claimant, at any time before assigning or receiving payment of the warrant, may waive this acknowledgment of indebtedness and sue the municipality upon his original claim.

Appropriation, being the authoritative application by the council of municipal revenues to a distinct object or definite purpose, fixes the rule of action governing all officers in the handling and disbursement of the municipal revenues.

No discretion is left to the financial officer in disbursing the municipal revenues; the funds appropriated to a specific object must be applied solely to it. Whatever be the statute or ordinance of appropriation, the disbursing officer must act in obedience to it.

113. **Taxing power.**—Taxation is an attribute of sovereignty. The power is not an essential function of a municipal corporation, but may be delegated to it by the state, either expressly or by necessary implication. Taxation is inherent in the state, as an essential attribute of sovereignty. It is primarily a legislative function, all taxation being based upon legislative authority; but, as stated before, the legislature may delegate this power to the municipality. This may be granted in express terms, or it may be implied as necessary for the exercise of other powers expressly granted. Thus, if a municipality is expressly authorized to borrow money, the power to levy taxes to raise revenue to meet the obligation is necessarily implied.

The power of municipal taxation is subject to the vereign will, and may be granted, enlarged, ridged, or revoked when and as the legislature shall em best. The legislature, at the creation of the rporation, may grant or withhold this power, as it shall seem best. It may give a small or large easure of the power; and after the original grant may enlarge, curtail, or wholly revoke it, subject ly to the vested rights of creditors.

114. **Public purpose only.**—Taxes may be levied a municipality for public purposes only. The gislature is the exclusive judge as to the rate of xation to be imposed upon the state by itself; and ch measure of taxing power as it possesses it may nfer upon a municipality. If the power is perrted to private purposes, it is no longer taxation; is extortion. And it matters not whether the alversation is in small or in large sums; it is an buse of sovereign power, amounting to robbery nder the forms of law. The touchstone of all taxaon, municipal and state, in our country, is not, then, ne rate of the levy, but the object of the ppropriation.

115. **Judicial question.**—Whether the purpose is ublic or private is for ultimate decision by the ourts. The facts of any case being conceded or roven, it is then for the courts to declare the law; nd, while the common council of a municipality are mpowered in the first instance to express their view f the nature of the tax, their opinion is not conclu-ive, but may be subjected to the ultimate test of udicial determination. It has been held that public

moneys in a town treasury cannot be distributed among "the inhabitants of the town according to families."[86] Also there is a decision that the credit of a town cannot be loaned to a manufacturing firm to induce the location of the manufacturing plant in the town.[87] Furthermore, it has been decided that a tax on a foreign insurance company for the benefit of disabled firemen was void.

On the same principle the proposed issuance of $20,000,000 worth of bonds by the city of Boston to raise money to loan to lot-owners for the purpose of rebuilding in the burnt district in the city after the great fire of 1872 was declared to be null and void.[88] The same ruling had been previously made upon a similar act of the legislature of South Carolina in regard to the city of Charleston after the fire of 1866.[89]

116. **What are public purposes.**—A general concurrence of judicial opinion includes among public purposes of municipalities: (1) The administration of justice; (2) the preservation of peace and order; (3) the protection of property; (4) the facilitation of locomotion and transportation; (5) the preservation of the public health; (6) the support of public education; (7) the promotion of public comfort; (8) the care of the helpless; (9) the reward of civic fidelity and heroism.

The question of what is a public and what a private purpose is to be found fully expressed in the

[86] Hooper v. Emery, 14 Me. 375.
[87] City of Parkersburg v. Brown, 106 U. S. 487.
[88] Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39.
[89] Feldman & Co. v. Charleston, 23 S. C. 57, 55 Am. Rep. 6.

pinion of Judge Black in the celebrated case of harpless v. City of Philadelphia,[90] which may be us digested:

"Taxes may be imposed for roads of all kinds, nals, and bridges, that there may be facilities for ansportation of freight and for travel; for public hools or colleges, that the people may be educated; r public libraries, that their means of improvement ay be increased; for the poor, the dumb, the blind, e insane, lest they suffer from want; for the police the state, in regulations for the preservation of alth or the detection of crime; for courts of law, at individual rights may be protected and enforced, d that crime, when detected, may receive its fitting nishment; for the preservation of peace and the rotection of the country from foreign enemies; to d, encourage, and stimulate commerce, domestic d foreign, by the establishment of mints, postal stem, and maintaining navies to keep open the ighway of nations; to encourage citizens in the defense of their country by suitable rewards and mentos for past services in times of war, or by unties for enlistment for future services; and for e promotion of the arts and sciences. For all these atters taxes may be imposed. The purpose is public. The object is governmental. The money raised d property purchased are held by the agents of the tate for the state. The object is so to regulate the tate that all its citizens may enjoy their lives, liberty, and property, and pursue their happiness cording to the dictates of their own reason."

[90] 21 Pa. 147, 59 Am. Dec. 759.

117. **Subjects of taxation.**—The power of municipal taxation extends over all persons and property within municipal boundaries, and in certain instances also to adjacent realty.

The law of actual situs prevails with regard to chattels. They are taxable by the municipality if they are usually kept or belong within its limits; and this is so regardless of the domicile of the owner. But goods and chattels found temporarily within a municipality are not taxable therein; as where a vessel is at a city wharf taking on freight, her situs is not there, but at the home port, or domicile of the owner.

118. **State may impose taxes.**—The state, in the exercise of its sovereign power, may impose special taxes upon the municipality for governmental, but not for strictly municipal, purposes. In creating a municipal corporation and conferring upon it the taxing power, the state does not and cannot surrender its own inherent sovereignty over the people and property within the municipal boundaries. No municipal power can exist in perpetuity.[91] The inherent power of taxation possessed by a state may be exercised by the legislature upon property within as well as without the municipal boundaries; and for any strictly governmental purpose it is conceded that the state may tax municipal property not only for general objects, but by special assessment for local improvements.

It is also generally recognized by the courts that for purely municipal purposes the municipality may

[91] Meriwether v. Garrett, 102 U. S. 472, LEADING ILLUSTRATIVE CASES.

t be taxed by the state without its consent. The o leading cases in the United States representing scordant views are those commonly known as the iladelphia City Hall Case[92] and the Detroit Park se.[93] In the former of these it was ruled that the te might compel the city to pay for the erection "an enormous pile which surpasses the town halls d cathedrals of the Middle Ages in extent if not grandeur"; and in the latter that the state could t compel the city to pay for the purchase and im- ovement of a city park. Between these divergent ews of legislative control over municipal corpora- ns is found a variety of decisions in divers states to the legislative power to impose taxes upon a unicipality, which generally recognize the doctrine ove stated, but differ in its application to particu- r cases.

119. **Express and implied power.**—The munici- lity may exercise the power of taxation expressly nferred upon it only within constitutional limita- ns. This doctrine is so self-evident as scarcely to ed elucidation. The legislature itself can confer on a municipality no greater measure of power an it possesses itself; and, since it can enact no lid law contrary to the constitutional provisions, can confer upon the municipality no power to pass nconstitutional ordinances.

The municipality may levy taxes for the perform- nce of any municipal duty imposed, or exercise of y municipal function conferred upon it by charter

[92] Perkins v. Slack, 86 Pa. 270.
[93] People v. Detroit, 28 Mich. 228, 15 Am. Rep. 202.

or by general law. Of the three classes of municipal powers, express, inherent and implied, it is obvious that a municipality for the purpose of taxation possesses the first within constitutional limitations, but may not exercise any under the second class. What implied power for taxation belongs to a municipal corporation is not so easy to determine. Here, however, as elsewhere, in the construction of municipal charters, the general doctrine is applied that the corporation has by implication such measure of power as is necessary to the proper execution of the charter powers expressly granted. Thus, the power to borrow money implies the power of taxation sufficient to repay the loan. The power to grade and pave streets implies the power to collect sufficient revenue to pay the expenses of the improvement. But power to make by-laws to "promote the benefit and advantage of a corporation" does not authorize it to levy a tax to pay the expense of procuring the location of a railroad through the municipality, and the power to enact by-laws necessary for the security, welfare, and convenience of the city does not authorize a tax on liquor dealers.

120. **License tax.**—A license tax may be imposed by the municipality only when power to do so is expressly conferred. Municipal licenses may be divided into two classes: (1) Police, and (2) revenue. A municipality may license certain occupations and forbid the exercise of the same by unlicensed persons. This is under the police power granted to the municipality; but in such case the fee to be charged against the licensee is determined by the necessary expense

nnected with the police regulation. The taxing wer, however, cannot be implied from the police wer. And so where the sum charged for a munic- al license is obviously for purposes of taxation, and t merely a license fee, the charge is unauthorized d void, unless authority to levy a license tax has en expressly conferred by charter or general legis- tion. The tax on occupations is upon persons pur- ing such occupations within the city, whether their sidence be inside or outside the corporate limits. nd no discrimination can be made as between resi- nts and non-residents. A person residing within a y cannot be taxed upon his occupation if it be rsued exclusively outside the municipality.

121. **Assessment and collection.**—Municipal xes may be assessed and collected by state officers nder general law, or by municipal officers thereunto thorized by the state, and appointed and directed the municipality. The general methods of state xation are pursued by municipalities. When mu- cipal officers are appointed for this purpose they ay discharge this duty as directed by statute or nder municipal ordinances when authorized by law. The municipality may use the tax duplicate or ssessment list of the county or a special municipal ssessment list may be made for the corporation ac- rding as the law may provide.

And as in case of assessments, so of collections, the ty may be performed under law either by county municipal officers.

122. **Creditors' rights.**—The courts may compel e levy and collection of taxes by a municipality to

satisfy municipal indebtedness. A municipal creditor having matured indebtedness against a municipality may pursue the usual methods to enforce collection by action at law, judgment, and execution; but, since all municipal property used in the performance of governmental functions is exempt from execution, such mode of collection usually proves inadequate, and the creditor finds the usual remedy at law greatly embarrassed, and oftentimes totally ineffective. Whenever this is made to appear, the courts will grant him the remedy of mandamus to enforce satisfaction by means of taxation.[94]

In the federal courts and some state courts a judgment is an essential prerequisite to this writ; but in many of the state courts this is not the rule; and in some the procedure admits of a judgment and mandamus in the same suit.

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The standard work is *Dillon* on Municipal Corporations now in the 5th edition. A good treatise of one volume adapted to students' use is *Ingersoll* on Public Corporations. Other good treatises are *Abbott* on Municipal Corporations; *McQuillin* on Municipal Corporations.

[94] Darling et al. v. Mayor and City Council of Baltimore, 51 Md. 1, 88 Am. Dec. 248, LEADING ILLUSTRATIVE CASES.

QUIZ QUESTIONS

MUNICIPAL CORPORATIONS

(The numbers refer to the numbered sections in the text.)

1. Define a municipal corporation and distinguish it from (1) a county, (2) a township, (3) a town.
2. Which ones of its essential elements seem to you to be more corporate, and which ones more municipal?
3. What is the mode and method of creating a municipal corporation in the United States?
4-5. What kind of bodies have power to create municipalities? Name those having such power.
6. (a) Who must take formal action in our country in order to set up and establish an actual municipal corporation performing the functions of such an organization? (b) How does a legislature exercise its authority in creating a corporation?
7. Define a general charter, and describe the creation of a municipality under it.
8. What is a constitutional provision, and what provisions of this kind are generally found in the United States for municipal corporations?
9. Suppose a constitution requires a popular vote to authorize municipal incorporation, but a town organizes and operates a corporation without such election. Are its corporate acts valid?
10. In America may a municipal corporation have lawful existence without express legislative authority, plainly and positively directing and warranting its organization and operation?
11. (a) Suppose the residents of Podunk, for which a special municipal charter has just been granted, refuse to act

under it. Is Podunk in that case a municipal corporation? (b) Suppose that later one-tenth of the voters actually organize a corporate government under said charter, against the protest of the other nine-tenths. What then is the status of Podunk?

12. What is the method of testing the validity of a municipal corporation?
13. What alterations may be made in a municipality? Who may make them, and how?
14. May a municipality be cut in twain, and formed into two separate corporations? What becomes of the corporate property?
15. (a) May two distinct and separate contiguous municipalities without their consent be merged or consolidated into one corporation? (b) Do you know or have you heard of such action being taken anywhere?
16. What limitation is there or can there be upon the power of a legislature to create, alter, amend or destroy a municipality? Give reasons.
17. (a) How is the life of a municipal corporation lawfully ended? (b) Suppose that for five years not a single corporate act is done. What is then its status? (c) May resident citizens then revive the corporation without legislative action?
18. Describe a special charter and a general charter and note the difference between them.
19. What were the form and nature of the royal municipal charter of England in the XVI century?
20. (a) Wherein did this differ from the standard American charter of the XX century? (b) State some of the general provisions of the latter.
21. (a) What is the meaning of the phrase "general welfare clause" in a municipal charter? (b) What special powers have the courts declared were embraced within this phrase, "general welfare clause?" (c) What particular powers have the courts refused to sustain under this clause? (d) Name and define the two great classes under which all municipal powers are classified.
22. (a) Under modern rules, what persons are considered to be members of a municipality? (b) May a municipal cor-

poration exercise police power beyond its own corporate limits?

3. Is it essential to the validity of a municipal charter that the people within its territory shall accept it? Give the reason.

4. (a) Podunk exists under a special municipal charter. Must she produce her charter in court when she sues? Why? (b) Is the rule the same under a general charter? Why?

5. How is a municipal charter obtained under general law? Describe the process.

6. Name and define the various classes of municipal powers.

7. (a) Are the words "incorporate," "establish," "found," "erect," "create," or any of them essential in a municipal charter? (b) What form of words is sufficient?

8. Without process or notice of any kind a legislature repeals the act creating Podunk a municipality. What is the effect?

9. If a statute is enacted closing the public schools and converting the municipal school house into barracks for militia, is it a valid law? Why?

10. (a) By a certain act the Podunk police are removed in a body and other persons appointed in their stead. What is the effect? (b) In the same act the commissioners operating the Podunk trolley cars are also removed and persons named to succeed them. What do you say of this act? Why?

11. Again suppose you are municipal treasurer of Podunk, and are by statute directed to pay all corporation money collected by you to the county treasurer, or the state treasurer. What will you do?

12-33. Podunk's franchise to build and operate water works is repealed. What is the effect? Suppose (a) no work has been done, (b) the water system is in full operation.

34. (a) Podunk obtained a bond loan of $50,000 on a promise expressed on the face of the bonds that no more bonds should be issued by it until these were paid; before payment preparations are made to duplicate this loan. As one of the bondholders, what may you do to protect your loan? (b) There is a disputed claim against your town for $10,000 for a cranky, unreliable fire engine. On a fair municipal election your people vote, ten to one, not to

pay it. The legislature thereupon levies a direct tax on your town for $10,000, and appropriates it to this claim. What will you do about it? Why?

35. May the legislature convert a city hall into a county court house? or a market house into a state asylum?

36-37. May the state levy a tax to compel a city to pay the expense of changing her macadam streets into asphalt avenues? Give a summary of the correct trust doctrine of the relation of state and city to municipal property.

38. What is a corporate meeting, how is it assembled and how conducted?

39. What difference, if any, is there between the functions of a mayor and those of a councilman or alderman?

40. (a) Of what practical utility are the minutes of corporate meetings? (b) For what purposes may they be used? (c) And for whom?

41. Distinguish between a "by-law," a "resolution" and an "ordinance."

42. How are ordinances enacted and given effect as laws?

43. What are the essential qualities of a valid ordinance?

44. What have you to say of an ordinance forbidding anyone to erect and use a steam engine within corporate limits without a permit from the mayor?

45. Is an ordinance valid which requires certain persons by name to construct local improvements on the streets in front of their lots?

46. (a) What say you of an ordinance assigning a different license rate to residents and non-residents for the same privilege? (b) One forbidding the renting of private property to lewd women? (c) One forbidding cattle running at large? (d) When one defends against an ordinance because it is unreasonable, and he is enjoying his constitutional right to a jury trial, who decides the case, the judge or the jury? (e) What unusual ordinances have been declared not unreasonable? Mention at least four. (f) What power over tippling has a municipal corporation in a license state?

47. What procedure may be used to enforce an ordinance?

48. Define distinctively an officer, an agent, and an employee in a municipality.

49. What municipal officers belong to the governmental class, and what to the municipal?

50. (a) If asked whether your neighbor Jones is eligible to a municipal office, say alderman, what will you read to enable you to answer? (b) How would you learn how he is chosen, and what are his duties?

51. Mayor Jones dies and his son, without election, assumes the office, and performs its functions unquestioned till the term expires. Is he mayor de facto?

52. Dobbs was inducted into the office of chief of police, at a salary of $1,200. When the new fire engine came he was required as such chief to perform the duties of fire-chief also. When denied additional pay he sued for it. Decide the case.

53. (a) May the title of any municipal officer, actually serving, be challenged, and tested indirectly? Why? (b) May a municipal officer resign merely because he is piqued or dissatisfied? (c) And what results if his resignation is not accepted?

54. What authority have the state courts over purely municipal officers?

55. Are any municipal officers subject to removal? If so, what officers? By whom?

56. Is an officer personally liable on a municipal contract made by him as a municipal agent?

57. (a) Is he personally liable in a civil action for any tort committed in his official capacity? If so, when and why? (b) For what, if anything, is a municipal officer bound to reimburse the corporation?

58. Wherein do municipal contracts differ, if at all, from the contracts of private corporations or persons, in the rules that govern their making, performance and breach, and the consequences thereof?

59. (a) Define "ultra vires" and apply it with reference to the contracts of municipal corporations. (b) Give three illustrations of contracts by municipalities which the courts have declared void because ultra vires. (c) Suppose a municipality after actually making a contract beyond its lawful power, deliberately ratifies it and takes benefit under it. Does that estop the corporation from pleading

ultra vires to an action for breach of the contract? (d) Under what condition will a contract only partially ultra vires be wholly void? And under what other condition may it be valid in part?

60. What may save from total loss a dealer who has sold and delivered to a municipality articles of value under a contract which is clearly ultra vires?

61. What have you to say of a plea of ultra vires made by a municipality to a contract for school supplies made with the city attorney, under which the city had received the articles bought?

62-63. Is the city liable on an oral contract for supplies which the charter requires to be bought by contract in writing?

64. (a) What is meant by the phrase "letting of contracts"? To what classes of contracts is it applicable? (b) And what are the fundamental rules in regard to such letting?

65. (a) Give four illustrations of municipal contracts which are declared illegal and void for other causes than ultra vires. (b) Are municipal contracts affected by general statutes forbidding contracts in general terms only? (c) Are they controlled by the general rules of the common law?

66. (a) May a municipal corporation by virtue of its authority as a governing agency annul its own contracts or repudiate them? (b) May the state legislature pass laws impairing the obligations of municipal contracts?

67. Under what conditions are the negotiable bonds of a municipal corporation open to legal or equitable defense in the hands of an innocent transferee for value, just as in the hands of the original holder?

68. Define and distinguish the two classes of municipal improvements.

69. (a) Describe the difference in the powers under which the two classes of municipal improvements may severally be made. (b) Point out particularly the distinctive features of local improvements which call forth extraordinary municipal power, that must be expressly granted.

70. What are the preliminary proceedings generally essential to the imposition of extraordinary municipal burdens for public improvements.

71. State the three essential conditions precedent for making a valid municipal contract for improvements.

72. (a) What is the rule of the common law about damages for improvements as stated in the famous Pittsburgh case? Relate the case. (b) What is the present state of the law on this subject? And how has the change been wrought?

73. Boal's lot in a special assessment district, being already low, is actually injured rather than benefited by the improvement. No provision is made by the law for such a case, and he is subjected to the usual frontage assessment. Must he pay it? If not, what is his remedy, and why?

74. What is the prevalent and logical doctrine with regard to the power of a municipality to make the special assessment a personal charge against the lot owners?

75. (a) What is the police power? (b) Where does it reside? (c) And what is its origin?

76. (a) Does the police power belong to a municipality? (b) If so, how does it obtain it? (c) Is it inherent in whole or in part?

77. What are the limitations, physical and otherwise, upon the municipal exercise of the police power?

78. (a) Give an illustration of the summary exercise of police power by a municipal corporation. (b) Suppose that some particular act is against not only the municipal welfare but also the peace and dignity of the state. Do the courts permit an enforcement of both state and municipal penalties therefor? Why?

79. What is the primary police function of a municipality, as of all other organs of civilization?

80. Has a municipality inherent power to preserve public health by any and all appropriate means?

81. (a) Next after the life and health of the community, what comes in the order of municipal importance? Is it, too, within the police power? (b) Give illustrations of the approved exercise of the police power to promote the public comfort by municipal corporations.

82. Illustrate the municipal exercise of the police power in a lawful way by instances affecting occupation, amusements.

83-84. Define a municipal market, and state how its proper

control may require the use of the police power by the municipality.

85. Define a street and state what it may include.
86. (a) Where resides the supreme power over streets, and why? And what is the consequence? (b) What power has a municipal corporation over its streets? And in case of conflict between it and the state, which prevails?
87. Define dedication and acceptance and show the effect of each, and of both together.
88. What is the primary use of a street, and how far may a municipality interfere therewith?
89. What rights in streets beyond those of the general public have abutting owners?
90. (a) What power over streets with reference to sewers has a municipality? (b) Is this an inherent power? (c) To what extent?
91. (a) May a city voluntarily acquire and own parks and squares? (b) May they be imposed upon it by the state? Relate the Detroit case.
92. (a) Has a city inherent power to buy, build and own necessary public buildings? (b) May the state impose this duty and expense upon the city? Relate the Philadelphia case.
93. What is the general doctrine of municipal liability for tort? State the reason for it.
94. (a) Podunk's policemen arrest and imprison Jones without warrant, and torture him to force confession of guilt of a burglary. Is Podunk liable to Jones in damages for this? Why? (b) Is Podunk liable to Jones for the burning of his house occasioned by its failure to provide a fire engine for the corporation? Why?
95. For what sort of municipal injury is the corporation liable?
96. What is the nature of a city's failure to keep its streets in proper repair?
97. For injury resulting to a traveler from neglect to keep its streets in repair is the city liable in your state? Why?
98. Suppose the traveler's injury results from municipal negligence properly to signal an obstruction placed in the street by a stranger. Is the city liable to the traveler therefor? Why?
99. (a) Whose is the duty to keep in proper repair the side-

walk, the city or the abutting owner? (b) Podunk's ordinance requires every abutting owner to construct the sidewalk and keep it in repair. Is Podunk liable to an abutting owner for a broken arm caused by slipping on the ice on the sidewalk in front of his own lot?

200. Is there municipal liability for civil injury to a citizen upon the city's bridge or viaduct resulting from municipal negligence? Why?

201. You suffer injury from a defective system of sewers in your city. Is the city liable to you therefor, supposing the injury result (a) from defective construction, (b) from the defective plan of sewer? Why?

202. What is the doctrine of respondeat superior? Is it applicable to municipal corporations?

203. Relate the Salt Lake City case decided in the U. S. Supreme Court. Does the doctrine of ultra vires apply to that case? Explain fully?

204. For what purposes may a municipality incur indebtedness? And who shall determine the amount thereof?

205. What are the limits beyond which a municipal corporation may not go in contracting indebtedness? How are they fixed?

206. What does the commercial world understand by the term "municipal bonds"? What is their form and for what are they issued? (a) Has a municipality inherent power to borrow money on municipal credit? (b) Whence and how does such power come?

207. Has the municipality inherent power to issue bonds? May it have implied power? From what?

208. Distinguish municipal warrants from municipal bonds. Is express power essential to issue valid warrants? What is their lawful limit?

209. (a) What is a municipal fund? (b) How is it created? (c) May it be diverted by municipal action? (d) What rights may creditors obtain in municipal funds? (e) May such funds be superior to legislative control? (f) When are they so, and how do they become so?

210. What are embraced in the expenses of a municipality? Will the term properly include bonds and warrants?

111. What is a budget, and what is its object? What good purpose does it serve in municipal administration?

112. (a) What is meant by the phrase "municipal claims"? (b) May they be sued on? (c) If so, when? (d) Describe appropriation in municipal administration. (e) What is its legal effect? (f) What rights do creditors obtain under it?

113. (a) Has a municipality the power of taxation? What are the nature and source of the power? (b) What control, if any, has the legislature over the power of municipal taxation? May it limit the rate of levy?

114. For what purposes may a municipality levy taxes?

115. (a) What power in the state or city ultimately decides whether a municipal tax is for a public purpose? (b) What became of the municipal levies made in Boston and Charleston (S. C.) to raise money to loan to lot owners to rebuild?

116. What have been judicially held to be public purposes? Name at least four of them.

117. (a) What is meant by the apportionment of taxes, and what rules are there for it? (b) You live in Podunk and own a house therein, and a lot just beyond corporate limits. You keep your notes, stocks and bonds in a safe deposit in the nearest city. Podunk levies a tax on your poll, your house, your lot, and your stocks and bonds. Will you pay it, or what will you do?

118. Podunk votes down a proposition to build a new school house. The legislature levies $10,000 taxes, one half payable this year, the other half next, and appropriates it for a new municipal school building. Is this levy valid?

119. (a) What is the limitation of the municipal power to levy taxes? (b) What is the source of this municipal power of taxation, inherent, implied or expressed?

120. (a) Is it competent for the municipality to levy a license tax? May it levy such tax for any other purpose than the state dues? (b) You challenge the right of the corporate officer to collect any tax from you for anything, and a lawsuit ensues. He calls the mayor and clerk to testify that taxes were levied and orders given him to collect. What will you do?

21. Who assesses municipal taxes, and how? Who collects them, and how?

22. You have a judgment against Podunk for $2,000 and the council has levied a special tax and appropriated it to your judgment. The corporation treasurer, while collecting the taxes, laughs at your call for money and informs you that he will pay this appropriation, as soon as collected, to Bulger for a chemical fire engine. What will you do about it?

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